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IN THE

Supreme Court of the United States

No. _____

ALFRED EKANEM, LINDA MARSHALL, DONALD KEMP and TONI HARDIMAN SPICER, on Behalf of Themselves and All Other Persons Similarly Situated,

Petitioners,

vs.

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, DR. VAN HOEK, as Director of Wishard Memorial Hospital and Individually, WISHARD MEMORIAL HOSPITAL, RICHARD LOWERY, as Executive Director of Health and Hospital Corporation and Individually, REGENSTRIEF DIVISION of Health and Hospital Corporation, and Individually, PERSONNEL DEPARTMENT OF THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, LEE VORHIS, as Director of Personnel Department of Health and Hospital Corporation and Individually, DIVISION OF PUBLIC HEALTH OF HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, DR. FRANK JOHNSON, as Director of Division of Public Health of Health and Hospital Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

John Moss, Jr., Esq.
156 East Market Street
Suite 701
Indianapolis, Indiana 46204
Telephone: (317) 635-1945

Attorney for Petitioners

Central Publishing Company, Inc., Indianapolis, IN 46206

108pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT AN EMPLOYMENT DISCRIMINATION CASE BASED ON RACE, CERTIFIED BY THE TRIAL COURT AS A CLASS ACTION UNDER TITLE VII AND §§1981 and 1983, SHOULD HAVE BEEN DISMISSED AFTER PETITIONER ESTABLISHED A PRIMA FACIE CASE ON THE GROUND THAT PETITIONER CHECKED ONLY THE RETALIATION BOX IN HIS E.E.O.C. CHARGE, ALTHOUGH HE ASSERTED RACE DISCRIMINATION IN THE BODY OF HIS CHARGE, AND E.E.O.C. HAD MADE A DETERMINATION OF RACE DISCRIMINATION.

II. WHETHER OR NOT THE COURT OF APPEALS, BY REFUSING TO REMAND THIS CASE BACK TO THE DISTRICT COURT AFTER FINDING AND HOLDING THAT THE DISTRICT COURT APPLIED ERRONEOUS LEGAL PRINCIPLES WITH RESPECT TO THE PETITIONERS' CLASS EVIDENCE, HAS UNLAWFULLY DENIED THE PETITIONER AND THE CLASS RELIEF TO WHICH THEY ARE ENTITLED UNDER 42 U.S.C. §§1981 and 1983.

III. WHETHER OR NOT THE PETITIONERS' EXPRESSION OF PRIVATE AND PERSONAL OPINIONS REGARDING HIS PUBLIC EMPLOYMENT ARE PROTECTED UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

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Respondents.

HISTORICAL BACKGROUND

On February 11, 1975, the petitioner, a black male, filed a formal charge of discrimination with the Indianapolis office of the Equal Employment Opportunity Commission against his corporate employer, the Health and Hospital Corporation of Marion County, Indiana. The EEOC charge alleged that the petitioner had been transferred in retaliation for speaking out against the discriminatory manner in which his employer, the corporate respondent, treated its black employees, with specific reference to discharge, discipline, job assignment and job evaluations. The Equal Employment Opportunity Commission investigated the petitioner's charge and on March 3, 1977, the Commission issued its determination letter and found reasonable cause to believe that the corporate respondent had violated §§703(a)(2) and 704(a) of the Civil Rights Act of 1964, because the petitioner opposed the respondents' discrimination against him and other negroes because of their race. Thereafter, the Commission issued to the petitioner a right-to-sue letter.

PROCEEDINGS IN THE COURT BELOW

The petitioner filed suit in the United States District Court for the Southern District of Indiana, alleging violations of Title VII, 42 U.S.C. §§1981, 1983, and the First Amendment to the Constitution of the United States. The district court certified a class under 42 U.S.C. 2000(e) et. seq., 42 U.S.C. §§1981 and 1983 for the claims of discrimination based on race in promotion, pay, job assignment, job classification, denial of advancement through operation of the seniority system, selection for supervisory positions, and application of educational criteria for selection into salaried positions, and discipline and discharge. The class of black employees consists of over one hundred (100) black citizens.

At the close of the petitioner's case in chief, pursuant to the respondent's motion under Rule 41(b), the district court

dismissed the individual claims and the previously certified class claims holding that: 1) petitioner was not an adequate class representative because his 1975 EEOC charge had not specifically alleged discrimination against him because of his race; 2) that the petitioners' statistical evidence of class wide discrimination could not be considered because it did not include an analysis of the make-up of the appropriate outside labor market;[1] and 3) that petitioner Ekanem's First Amendment freedom of speech rights had not been violated when he was fired in 1979 for writing a letter, and by writing a memorandum to his boss concerning his job.

On appeal, the United States Court of Appeals for the Seventh Circuit, Pell, Wood and Hill, Judges, reversed the district court's finding and judgment that the petitioners were required to present statistical evidence regarding the "makeup" of the "outside labor market" in order to make a *prima facie* case of discrimination on their class claims. Nevertheless the Court of Appeals erred by refusing to remand the case to the trial court for additional findings in light of the correct legal standards or for a new trial. Additionally, the Court of Appeals held that the act of firing petitioner because he wrote a letter and a memorandum concerning his employment did not violate his federal constitutional rights to free speech and expression.

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[1] However, the district court did find and state that he *credited* statistical analysis of defendants' workforce regarding classwide discrimination. The district court said, "I only make these observations to explain the reason why, while I certainly credit Dr. Liell's work and his testimony, it does not go far enough for the Court to accept it." "Where I disagreed, or rather, where I elected not to predicate a ruling on Dr. Liell's conclusions is the fact that Dr. Liell in confining his analysis and his studies to the work force within the corporation, he gave no consideration to the availability of suitable or qualified personnel within the workforce of the metropolitan district. (Tr. 10/28-29/80, Vol. 22, pgs. 3370-3372).

THE PARTIES

I. The Petitioners

A. Mr. Ikot Alfred Ekanem

The petitioner, Ikot Alfred Ekanem, is a black male who resides in Indianapolis, Indiana. He was first employed by the respondent, the Health and Hospital Corporation of Marion County, Indiana, in October 1972, as a clerk-typist, at which time he held a Master's degree in Health and Hospital Administration with a specialty in labor relations. The petitioner continued in the employment of the respondent until February 2, 1977, when he was discharged because of his race and because he opposed the respondent's racially discriminatory employment practices. Petitioner Ekanem was reinstated pursuant to the District Court's Order but was fired again in July 1979 because he wrote a letter and because he wrote a memorandum concerning his employment.

B. The Class

On August 26, 1980, the district court certified a class under Title VII, 42 U.S.C. §§1981 and 1983. The class consisted of all past, present and future black employees of the respondent corporation since July 2, 1965. The class claims are:

(a) Discrimination against black employees in the assignment of jobs.

(b) Discrimination against black employees in the denial of job transfer and in the denial of advancement through the operation of the seniority system.

(c) Discrimination against black employees in the selection for supervisory positions.

(d) Discrimination against black employees in the application of educational criteria for selection into salaried positions.

(e) Discrimination against black salaried employees in promotions.

(f) Discrimination against black employees in rates of pay.

(g) Discrimination against black employees in classification.

(h) Discrimination against black employees in testing practices.

(i) Discrimination against black employees in disciplinary and discharge practices.

(j) Retaliation against all persons, regardless of race, because they opposed the Corporation's alleged unlawful employment practices.

The class contains over one hundred (100) black citizens of the United States residing in the State of Indiana.

II. The Respondent, the Health and Hospital Corporation of Marion County, Indiana

The Health and Hospital Corporation of Marion County, Indiana, is a municipal corporation, created by the acts of Indiana, 1951, Chapter 287, as amended and supplemented, to administer public hospitals, to control public health problems, and to offer public health services. The Health and Hospital Corporation of Marion County is located in Indianapolis, Indiana, and it maintains several facilities throughout Marion County. The respondent corporation employs more than three thousand (3,000) persons.

DECISIONS BELOW

1. *Ekanem, et al. vs. The Health and Hospital Corporation of Marion County, Indiana*, District Court Decision No. 77C-224, Slip Op. S.D. Ind., November 28, 1980. 24 F.E.P. 1257.

2. *Ekanem, et al. vs. The Health and Hospital Corporation of Marion County, Indiana*, United States Court of Appeals for the Seventh Circuit, No. 80-2835, decided December 14, 1983.

3. *Ekanem, et al. vs. Health and Hospital Corporation of Marion County, Indiana*, Petition for Rehearing with Suggestion of Rehearing En Banc, denied by order issued February 7, 1984.

4. Equal Employment Opportunity Commission Determination Letter, issued March 3, 1977, charge number TIN5-0905.

These opinions have been reproduced and are included in the Appendix.

JURISDICTIONAL STATEMENT

This application for writ of certiorari is brought under the provisions of 28 U.S.C. §§1254(1) and 2101(c), to review and correct the Seventh Circuit Court of Appeals' panel decision of December 14, 1983, and order of February 7, 1984, denying the petitioners' petition for rehearing.

This Court is urged to grant certiorari to:

1. Resolve the "inter-circuit" conflict of law among the decisions of several federal circuits upon the question of the permissible scope of a judicial complaint in federal district court founded on an EEOC charge, and an EEOC investigation and letters of determination. The Seventh Circuit's opinion in the instant case is in direct conflict with the opinions in *Gamble vs. Birmingham Southern Railroad Company*, 514 F.2d 678 (5th Cir., 1965), *Sanchez vs. Standard Brands, Inc.*, 431 F.2d 455 (5th), *Fellows vs. Universal Restaurants, Inc.*, 701 F.2d 447 (1983, 5th), *Hicks vs. ABT Associates*, 572 F.2d 960 (3rd Cir., 1978), *McBride vs. Delta Airlines*, 551 F.2d 113 (6th Cir.), *Eastland vs. Tennessee Valley Authority*, 715 F.2d 1066 (12th Cir., 1983), *Jackson vs. Nimno*, 558 F.S. 85 (1983), *Price vs. Southern Bell Telephone Company*, 687 F.2d 74 (1982, 5th).

2. Resolve the conflict among the decisions within the Seventh Circuit on the same issue. The judges are sharply and irreconcilably divided. The instant decision is in direct conflict with these 7th Circuit opinions, *Jenkins vs. Blue*

Cross Mutual Hospital Insurance, 538 F.2d 164 (7th Cir., en banc 1976), *Rosel vs. Joliet Wrought Washer Company*, 596 F.2d 183 (7th Cir., 1979), and;

3. This decision of the Seventh Circuit Court of Appeals is unfair. Over one hundred (100) individual claimants did not file their respective claims because of the pendency of the instant class suit. Now, the statute of limitations has run on all of the individual claims. The Court of Appeals held that the district court made a fundamental legal error in assessing the entitlement of class members to relief. In view of this holding of the Court of Appeals, it was unfair for said court to refuse to remand the cause back to the district court for supplemental findings applying the correct legal principles. The appellate court has held that the class could be entitled to relief, yet has refused to remand the case so that they might get relief. The petitioners have exhausted all other available avenues of appeal.

STATEMENT OF THE CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

§2000e-2. Discrimination because of race, color, religion, sex, or national origin.—(a) It shall be unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (July 2, 1964, PL 88-352, Title VII, §703, 78 Stat 255.)

§2000e-3. Other unlawful employment practices.—(a) It shall be an unlawful employment practice for an

employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [§§2000e-2000e-15 of this title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [§§2000e-2000e-15 of this title]. (July 2, 1974, PL 88-352, Title VII, §704, 78 Stat 257.)

TITLE 42

EQUAL RIGHTS UNDER THE LAW

§1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (RS §1977.)

From Act May 31, 1870, c14, §16, 16 Stat 144.

TITLE 42

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

§1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (RS §1979.)

From Act Apr. 20, 1871, c 22, §1, 17 Stat 13.

AMENDMENT I

Religious and political freedom.—Congress shall make no law respecting an establishment of freedom, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

On February 11, 1975, the petitioner a laymen to the law and its niceties filed an EEOC charge with the Indianapolis office of the Equal Employment Opportunity Commission. A complaint or charge form was provided to the petitioner by the Commission. Under "cause of discrimination", the box ☑ adjacent to "704(a)", which is the retaliation section of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. was checked. While the charge form was marked as a 704(a) complaint, in the body of the charge, the petitioner wrote out that he, a black man, was being unlawfully retaliated against because he opposed the racially discriminatory employment practices of his employer, the Health and Hospital Corporation of Marion County, Indiana. The Equal Employment Opportunity Commission investigated the petitioner's charges and in its determination letter issued on March 3, 1977, the Commission found reasonable cause to believe that the respondent had discriminated against the petitioner because of his race in violation of section *703(a)(2) and* had retaliated against petitioner in violation of *704(a)* of Title VII, the Civil Rights Act of 1964, as amended.

In February, 1979, the petitioner sent a letter to Dr. Frank Lloyd, Director of Medical Research at Methodist Hospital and a prominent black in the Indianapolis community. The petitioner wrote the letter in response to a local television news report which was critical of the expense of the office furniture purchased by a Dr. Frank

Johnson, a black director within the respondent's corporation. The petitioner's letter complained about the respondent's treatment of its black administrators, including Dr. Johnson, and requested that Dr. Lloyd exercise his influence in the community to protect and help the negro employees. In May, 1979, Dr. Johnson informed petitioner that he had reorganized his department and placed the petitioner in a supervisory position. Dr. Johnson then gave petitioner a copy of the revised organization chart. On May 30, 1979, the petitioner wrote a memorandum to Dr. Johnson. In this memorandum, the petitioner discussed his differences with certain staff members that had objected to working under the direct supervision of a black man, and requested that his job title be changed from administrative assistant to deputy administrator. The petitioner outlined his qualifications and noted that his current salary was not significantly different from the salaries of the persons he was to supervise, accordingly, the petitioner requested an increase in salary. The memorandum of May 30, 1979, was distributed only to Dr. Johnson, and the letter of February, 1979, was sent only to Dr. Lloyd. In June, 1979, petitioner was terminated from his employment for writing the May memorandum and the February letter.

The petitioner filed suit in the United States District Court for the Southern District of Indiana under Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §§1981, 1983, 1985(3) and 1988. The complaint, as amended, included individual and class claims of racial discrimination in the respondent's employment practices, individual and class claims of retaliation for protesting such discrimination and individual claims of violation of First Amendment rights. A class was certified under Title VII *and* §§*1981 and 1983.*

Trial on the merits began on September 23, 1980, and after twenty-six (26) days of trial, the petitioners concluded their case in chief and the respondent moved for dismissal under Rule 41(b). The district court granted the

respondents' motion and requested that the respondents submit proposed findings of fact and conclusions of law consistent with the court's ruling from the bench. On November 28, 1980, the district court issued a written order adopting the respondents' findings and conclusions.

The district court found the petitioner Ekanem was not an adequate class representative because his EEOC charge alleged retaliation and not race discrimination. Moreover, the court found that the petitioner's letter and memo were not protected by the First A..ıendment to the Constitution. Finally, the district court found and held that the petitioner's statistical evidence of classwide discrimination could not be considered, i.e., the district court concluded that the petitioner needed statistical analysis of the appropriate outside labor market to make out a prima facie case.

On appeal, the Seventh Circuit Court of Appeals affirmed the district court's ruling dismissing petitioners' individual and class claims. The appellate court held however, that the district court erred by ruling that the petitioner was required to present a statistical and evidentary analysis of the appropriate outside labor market in order to present a prima facie case. The application of an erroneous legal principle could have, and no doubt did, influence the trial court's ruling against the individual claims and the class claims. The Seventh Circuit panel held that the relevant labor pool was to be found within the corporation, not the outside community. The Seventh Circuit refused however, to remand the case back to the district court for supplemental findings applying the correct legal principles. The Court of Appeals concluded that the class had no adequate representative, despite the fact that EEOC found probable cause that the respondent had engaged in *race* discrimination against its black employees, after investigating the petitioner's 1975 charge.

Both the Court of Appeals and the district court wholly ignored the fact that the class had been certified not only

under Title VII, but under 42 U.S.C. §§1981 and 1983, as well. Neither 42 U.S.C. §§1981 nor 1983 require the filing of any administrative charge before bringing suit in federal court, however, the Court of Appeals held that the dismissal of the class claims was proper as the class had no representative who had filed the precise charge by checking the race box on the EEOC charge form.

The petitioners' petition for rehearing was denied on February 7, 1984, and now having exhausted all available avenues of appeals, petitioners entreat this court to grant certiorari.

ARGUMENT

The Court of Appeals' ruling that an EEOC charge alleging retaliation for opposition to racially discriminatory employment practices which triggered both an EEOC investigation into the suggestion of race discrimination and a finding of probable cause that race discrimination existed by EEOC, will not support a class claim of race discrimination in employment is in conflict with the decisions of other federal courts of appeal and conflict with applicable decisions of this Court.

The petitioner is an adequate class representative. He filed an EEOC charge, checked the retaliation box and alleged facts of race discrimination. The EEOC, after an investigation of the petitioner's charge, made a specific finding of discrimination based on race. It was error for the Court of Appeals to hold that the petitioner was not an adequate class representative in a suit brought to redress racially discriminatory employment practices.

The Civil Rights Act of 1964, as amended, was, and is designed to protect those persons who are least able to protect themselves. *Gamble vs. Birmingham Southern Railroad Company*, 514 F.2d 678 (1975, 5th Cir.), at 689. Because complainants to the Equal Employment

Opportunity Commission are laypersons, this Court has held that said charges should and must be given liberal interpretation.

> "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process. *Love vs. Pullman Company*, 92 SCt. 616 (1972) at 619.

Despite the demonstrated unwillingness of the federal courts to erect procedural roadblocks and barricades in Title VII actions, the Seventh Circuit Court of Appeals now offers a series of arguments in the present case which are premised on nothing more than hyper legal technicalities.

The Seventh Circuit Court of Appeals has taken the position that since the petitioner checked only the box labelled "retaliation, i.e. §704(a)," when he executed his original charge of discrimination he is now barred from including in his complaint allegations of race discrimination.

The instant Seventh Circuit's decision requiring such a high degree of specificity in an EEOC charge is not only repugnant to the letter, spirit and intent of Title VII, but is also in direct conflict with the majority of the federal courts in the United States.

> "To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected. *Gamble, supra*, at 689.

The following cases are authority holding that:

> "...a cause of action for Title VII employment discrimination may be based, not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like

> or related to the charges allegations, limited only by the *scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination."*
>
> *Fellows vs. Universal Restaurants, Inc.*, 701 F.2d 447, at 450, 451 (1983, 5th)

See also *Hicks vs. ABT Associates*, 472 F.2d 960, at 966 (1978), 3rd), *McBride vs. Delta Airlines*, 551 F.2d 113, at 115 (6th), *Jenkins vs. Blue Cross* (7th Cir., en banc, 538 F.2d 164, (1976), and all of the cases cited under sections 1 and 2 of the Jurisdictional Statement.[2]

In our case the EEOC did investigate and did find probable cause that respondent had engaged in race discrimination against petitioner, and had discriminated against petitioner in its pay practices.[3] So, certainly the

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[2] The following holding of the Seventh Circuit in the case before the court is contrary to law and is in specific conflict with the above cited cases. "First, the class is limited to claims falling within the scope of charges that the plaintiff formally files with the EEOC—even if the EEOC expands its investigation and right to sue letter beyond the particular allegations appearing in the plaintiff's EEOC complaint." (App. pg. A-72).

[3] The complete body of petitioner's EEOC charge is: "I believe I was discharged from my job as Assistant Personnel Director on December 5, 1974 and involuntarily transferred to the job of Deputy Administrator of Inner City Health Projects effective January 7, 1975, because I was an advocate of employees (mostly black) who were treated unfairly by supervisors (mostly white) in discharges, job assignments, discipline, and job evaluations. I also protested the decentralized discriminatory hiring system. I was thus denied a budgeted salary increase from $11,300 to $15,000 per year. On my new job (salary $12,500) I was denied the corporation-wide 5% cost-of-living increase effective January 12 and I believe I was hired for $2500 less than my boss would have recommended." (App. pg. A-83).

charge and the EEOC investigation and finding[4] support a claim before the district court of race discrimination, and, petitioner is an adequate class representative for blacks who have been discriminated against in pay. The Court of Appeals' ruling that petitioner is not an adequate class representative is clearly erroneous. Therefore, the Court of Appeals should be directed by this Court to remand this case to the district court for supplemental findings applying the correct legal principles. The Court of Appeals refused to remand *only* because it was of the erroneous notion that petitioner was not an adequate class representative.[5]

The instant decision is in conflict with the other Seventh Circuit Cases.

In Jenkins, *supra*, the district court had concluded that the plaintiff's EEOC charges limited her Title VII court

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[4] Records reveal that on January 12, 1975, all employees were eligible for a cost of living increase. We note no change in his salary at that time. We conclude that Charging Party was denied the cost of living increase.

It is undisputed that the salary range for the Deputy Administrator position was $14,200. It is further undisputed that Respondent transferring Charging Party with a starting salary of $12,532.

We therefore find that Charging Party was hired at a beginning salary lower than the lowest pole of the salary range."

(EEOC Determination, App. pg. 81)

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[5] "Plaintiffs are correct, in asserting that the relevant labor pool was to be found within the Corporation, not outside the community. Movement for Opportunity and Equality vs. General Motors Corp., 622 F.2d 1235, 1258 (7th Cir. 1980). Give this error, and the district court's failure to take into account evidence factoring in job classification and years of service, we ordinarily would remand for supplemental findings applying the correct legal principles." (App. pgs. A-70).

complaint to charges of discrimination because of her wearing an Afro hairstyle. The original appeal panel consisting of Judges Tuttle, Tone and Bauer held that her EEOC charge did not form the proper basis under Title VII for any complaint of discrimination on the basis of sex. 522 F.2d at 1241. Judge Tone and Bauer also agreed with the district court that the EEOC charge did not support allegations of racial discrimination beyond those due to wearing an Afro hairstyle.

Upon rehearing en banc, a majority of the entire court concluded that the judgment must and should be reversed and remanded in that the body of the EEOC charge was sufficient to support a count of sex discrimination in her district court complaint although she checked only the race box on her EEOC charge.

The Seventh Circuit said:

> "The correct rule to follow in construing EEOC charges for purposes of delineating the proper scope of a subsequent judicial inquiry is that the complaint in the civil action...may properly encompass any discrimination like or reasonably related to the allegations of the charge and growing out of such allegation. at 167.
>
> "In regard to sex discrimination, it is true that the plaintiff did not check the sex discrimination box on the EEOC form. In *Sanchez vs. Standard Brands, Inc., supra*, at 462-464, the reverse situation had occurred. The plaintiff had checked only the box labeled "sex" and in her judicial complaint alleged discrimination because of her "national origin." The Fifth Circuit said:
>
> > ...(W)e decline to hold that the failure to place a check mark in the correct box is a fatal error. In the context of Title VII, no one—not even the unschooled—should be boxed out."

Jenkins, supra, at 167.

Also, hypertechnical reading of an EEOC charge conflicts with the Seventh Circuit decision in *Rosel vs. Joliet Wrought Washer Company*, 596 F.2d 183 (7th, 1979). See also, intercircuit conflict as evidenced by the decision in *Jackson vs. Nimno*, 558 F.S. 85 (1983), where an employee filed a Title VII suit, alleging discrimination and constructive discharge. On the defendant employer's motion to dismiss, the district court held that the action was not subject to dismissal for failure of the administrative EEOC charge to *specifically* allege constructive discharge. *Jackson, supra*, at page 86.

In the instant case, the petitioner's EEOC charge alleged that he had been retaliated against by the respondent, because he opposed what he perceived to be racially discriminatory employment practices. The Commission investigated the petitioner's charge and concluded in its determination letter that the respondent had violated both section 704(a) retaliation, *and* 703(a)(2). A copy of the determination has been reproduced and is included in the appendix.

§703(a)(2) provides:

> "It shall be unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's *race, color*, religion, sex or national origin. (Emphasis added)

Obviously the Commission investigated the petitioner's charge with reference to both retaliation and race discrimination.

Petitioner's allegations of race discrimination are not only like and reasonably related to his articulated charge of retaliation, but the race discrimination issue was

investigated by the Commission, and it made a specific finding of race discrimination.

> "Investigation reveals that the payroll supervisor forbade caucasian females in her department to associate with charging party, and that she stated to a caucasian witness that 'charging party should be shipped back to Africa where he came from.' A policy of respondent's agent against interracial fraternization is advocacy of segregation of employees in violation of section 703(a)(2). Respondent is responsible for the orders promulgated by its agents. It is also obligated under this act to maintain a working atmosphere free of racial intimidation or insult." EEOC Determination Letter, March 3, 1977, page 2. (A-79)

The purpose of a charge under section 706 (42 U.S.C. 2000e 5) is only to initiate the EEOC investigation, not to state sufficient facts to make out a prima facie case. *Shell Oil Company, vs. EEOC*, 523 F.S. 79 at 86 (1981).

The instant court's decision denying relief to a class of over 100 persons because only the retaliation box was checked on the Commission's form is a meaningless triumph of form over substance.[6]

The petitioner was an adequate class representative under the §§1981 and 1983 class claims.

At least seven circuits, including the Seventh Circuit have held that §§1981 and 1983 are independent of Title VII, and that Title VII creates no procedural barrier to §§1981 or 1983 actions and that §1981 is available regardless of whether one has pursued his Title VII administra-

[6] If the petitioner had checked no box on his EEOC form his charge would have been nontheless valid and the court would have looked to the body of the charge to determine its nature and character.

tive remedies. *Macklin vs. Spector Freight Systems, Inc.* 156 U.S.App.D.C. 69, 478 F.2d 979, 996 (1973); *Gersham vs. Chambers*, 501 F.2d 687, 691 (2d Cir., 1974); *Young vs. International Telephone & Telegraph Co.*, 438 F.2d 757, 763 (3d Cir., 1971); *Alpha Portland Cement Co. vs. Reese*, 507 F.2d 607, 610 (5th Cir., 1975); *Guerra vs. Manchester Terminal Corporation*, 498 F.2d 641, 652 (5th Cir., 1975); *Hill vs. American Airlines, Inc.* 479 F.2d 1057, 1060 (th Cir., 1974); *Caldwell vs. National Brewing Company*, 443 F.2d 1044, 1046 (5th Cir., 1971), cert. den., 405 U.S. 916, 92 S.Ct. 931, 30 L.Ed.2d 785 (1972); *Long vs. Ford Motor Company*, 496 F.2d 500, 503 (6th Cir., 1974); *Waters vs. Wisconsin Steel Works of International Harvester Company*, 502 F.2d 1309, 1315 (7th Cir., 1974), cert. den., ___ U.S. ___, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976); *Brady vs. Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir., 1972). Certainly petitioner was an adequate class representative under §§1981 and 1983 class claims. It was therefore error not to remand the §§1981 and 1983 class claims to the district court for additional proceedings.

Respondents Abridged Petitioner's Freedom of Speech Rights.

The Seventh Circuit's decision as to the petitioner's First amendment claims, i.e., that privately expressed opinions regarding his public employment are not entitled to First Amendment protection are contrary to and in conflict with this court's decisions. *Givhan vs. Western Consolidated School*, 439 U.S. 410, 99 S.Ct. 693 (1971), *Pickering vs. B.O.E.*, 391 U.S. 463 (1968); and in conflict with the following Seventh Circuit decisions; *Egger vs. Phillips*, 669 F.2d 497 (7th, 1982), *Perry Local Educators Assn. vs. Hohlt*, 652 F.2d 1286 (7th, 1981).

CONCLUSION

WHEREFORE, for each of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

John Moss, Jr., Esq.
Attorney for Petitioners

APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 7, 1984.

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. IRVING HILL, *Senior District Judge**

	) Appeal from the United
	) States District Court
ALFRED EKANEM, *et al.*	) for the Southern
	) District of Indiana,
Plaintiffs-Appellants,	) Indianapolis Division.
	)
Nos. 80-2835, vs.	) No. 77-C-224
81-1963	) William E. Steckler,
	) *Judge.*
THE HEALTH AND HOSPITAL	)
CORPORATION OF MARION COUNTY,	)
INDIANA, et al.	)
	)
Defendants-Appellees.	)

ORDER

The opinion in this case, issued December 14, 1983, is modified as follows:

(1) On page 11, third line from the bottom, immediately before *"Pickering,"* insert: *"Connick v. Myers*, 51 U.S.L.W. 4436, 4438 (U.S. Apr. 20, 1983);".

(2) On page 12, delete the entire 1st full paragraph, beginning with "Even assuming, *arguendo*, etc."

*Honorable Irving Hill, Senior District Judge for the Central District of California, is sitting by designation.

(3) Also on page 12, delete the last sentence on the page, "The District Court properly dismissed this claim." and replace it with "The district court correctly concluded that Ekanem failed to sustain his burden of proof with respect to his first amendment claims."

On consideration of the petitions for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by both the plaintiffs-appellants and defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALFRED EKANEM, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	IP 77-224-C
	)	
THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, et al..	)	
	)	
Defendants.	)	

JUDGMENT

This cause having been tried before this Court beginning on September 23, 1980 and ending on October 29, 1980, and the Court having heard testimony from the Plaintiffs and their witnesses, having reviewed the exhibits offered by the parties and having reviewed the evidence submitted by the parties at the Preliminary Injunction hearing in this case held in 1978; and, the Court having considered all of the evidence presented by the parties and having made its findings of fact and conclusions of law,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing by their complaint, that judgment be entered in behalf of each of the Defendants and that the Defendants recover their costs.

Date: Nov. 28, 1980 /s/ William E. Steckler
Judge, United States
District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALFRED EKANEM, et al., *Plaintiffs,*	)	
-vs-	)	IP 77-224-C
THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, et al., *Defendants.*	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial of this action began on September 23, 1980. This matter comes before the Court pursuant to the Defendants' Motion for Involuntary Dismissal under FRCP 41(b) made at the close of Plaintiffs' case in chief on October 27, 1980. Pursuant to agreement of the parties at a pre-trial conference the Court has before it all of the testimony and exhibits presented by the parties during the preliminary injunction hearing in this case held in July, 1978. During the trial on the merits, the Plaintiffs presented numerous witnesses and hundreds of exhibits. The Plaintiffs' presentation of their evidence included the offering of the deposition testimony of many of the Defendants' officials.

The Court, after having heard and reviewed the testimony and exhibits before the Court, granted Defendants' Motion for Involuntary Dismissal stating generally its reasons therefore. The Court then requested the aid of Defendants' counsel in the preparation of proposed findings of fact and conclusions of law. Proposed findings and conclusion were submitted which the Court has carefully reviewed and revised. The Court, therefore, now issues its findings of fact and conclusions of law.

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FINDINGS OF FACT

I. Nature of the Case

1. This action was brought by Ikot Alfred Ekanem, Linda Murray Marshall, Donald Kemp and Toni Hardiman Spicer, as a class action against The Health and Hospital Corporation of Marion County (hereafter the "Corporation"), and others, alleging broad discriminatory employment practices. Plaintiffs brought this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

2. Plaintiffs' filed this action on April 15, 1977, and the complaint was amended, with leave of court, on August 18, 1978 and was again amended, with leave of court, on September 23, 1980. As last amended the complaint alleges causes of action pursuant to 42 U.S.C. §2000e, *et seq.* (Title VII); 42 U.S.C. §1981 (Thirteenth Amendment); 42 U.S.C. §1983 (Fourteenth Amendment); 42 U.S.C. §1985(3); 42 U.S.C. §1988 and the First Amendment to the Constitution of the United States. On February 26, 1980, this Court certified the class requested by Plaintiffs. On August 26, 1980, this Court modified its class certification as hereinafter noted.

Defendants

3. The following are the named defendants in this action:

(a) The Health and Hospital Corporation of Marion County, Indiana;

(b) Dr. van Hoek as Director of Wishard Memorial Hospital (a part of the Corporation's Hospital Division) and as an individual;

(c) Richard Lowery as Executive Director of the Health and Hospital Corporation and as an individual;

(d) Regenstrief Health Center (a part of Wishard Memorial Hospital);

(e) Richard Laird as Administrator of Regenstrief Health Center and as an individual;

(f) Personnel Department of the Corporation;

(g) Lee Vorhis as Director of the Corporation's Personnel Department; (Ms. Vorhis is currently Director of the Hospital's Personnel Department)

(h) Division of Public Health of the Corporation;

(i) Dr. Frank Johnson as Director of the Corporation's Division of Public Health and as an individual;

(j) Indiana University and its School of Medicine.

4. Defendant Indiana University (I.U.) and its School of Medicine were never named as respondents in any EEOC charge filed by any of the four named Plaintiffs, nor has any right to sue letter been issued to any Plaintiff against these Defendants.

5. Defendant I.U. and its School of Medicine were not in an employer-employee relationship with the Plaintiffs at any time material herein.

6. Lerona Vorhis was not named as a Defendant in this action in her individual capacity but only in her official capacity as Director of Personnel for the Defendant Corporation.

7. Defendants Robert van Hoek, Richard Laird, Frank Johnson and Richard Lowery in their individual capacities were never made a respondent in any EEOC charge filed by any of the four named Plaintiffs, nor has any right to sue letter been issued to any Plaintiff against these Defendants.

Individual Claims

8. In the last amended complaint, the named Plaintiffs make the following individual claims.

(a) **Alfred Ekanem Allegations.**

(1) In October, 1972, he was employed by the Corporation as a "clerk-typist". At such time he held a masters degree in health administration.

(2) In December, 1974, he was discriminatorily and involuntarily transferred and demoted.

(3) On February 2, 1977, he was unlawfully discharged because of his race, color, and national origin and because he opposed discriminating employment practices of the Defendants.

(4) He was subjected to discriminatory testing requirements and procedures.

(5) Defendants violated his right to freedom of speech and expression.

(6) On or about June 10, 1979, he was retaliatorily discharged from his employment with the Corporation.

(b) **Linda (Murray) Marshall Allegations.**

(1) On February 2, 1977, she was discharged by the Corporation because she opposed discriminatory employment practices of the Defendants.

(2) She was continuously denied performance evaluations and raises. She was harassed by corporate officials.

(3) Unwarranted and negative memos were placed in her personnel file.

(4) She was given burdensome assignments.

(5) She was unfairly denied earned benefits such as vacation.

(c) **Donald Kemp Allegations.**

(1) He was subjected to discriminatory and

retaliatory treatment because he opposed discriminatory employment practices.

(2) On February 2, 1977, he was discharged because he opposed discriminatory employment practices.

(d) **Toni Hardiman Spicer Allegations**

(1) She was discriminatorily discharged because of her race on August 2, 1974.

Class Claims

9. In the amended complaint, the Plaintiffs make the following allegations which could be considered as class claims:

(a) Discrimination against blacks in the hiring of salaried employees.

(b) Discrimination against black employees in assignment of jobs.

(c) Discrimination against black employees in the denial of job transfer and advancement through the operation of the seniority system.

(d) Discrimination against black employees in the selection for supervisory positions.

(e) Discrimination against black employees and applicants in the application of educational criteria for selection into salaried positions.

(f) Discrimination against black salaried employees in promotions.

(g) All persons, regardless of race, who have been punished, permitted to be punished, retaliated against, disciplined or permitted to be disciplined because they opposed the Corporation's unlawful employment practices.

(h) Discrimination against black employees in rates of pay.

(i) Discrimination against black employees in classification.

(j) Discrimination against black employees in testing practices.

(k) Discrimination against black employees in disciplinary and demotion practices.

All of these class claims are alleged to violate Title VII, §1981, §1983, §1985(3) and §1988.

10. On February 26, 1980, the Court certified this suit as a class action and the class on whose behalf the action should proceed was defined as follows:

> "All past, present and future Black employees of defendants since July 2, 1965; all past, present and future Black persons who were, or may be, applicants for employment with defendants since July 2, 1965; all past, present and future Black persons who attempted to, or may attempt to file applications seeking employment with defendants, but were not permitted to do so; and all past, present and future Black persons who, since July 2, 1965, would have filed applications seeking employment with defendants, but understood that it would be futile to do so because of defendants' discriminatory employment practices against Black people; and, all applicants for employment with defendants and all employees of defendants who have protested against the unlawful employment practices of defendants since July 2, 1965."

11. On August 26, 1980, this Court modified the class certification by limiting the time period under Title VII to 300 days prior to the filing of the first EEOC charge covering the claims and the period under 42 U.S.C. §1981 to two (2) years before the suit was filed (April 18, 1977). This Court also ruled that recruiting and hiring were not cognizable and, therefore, the class definition could not include applicants or potential applicants since no representative plaintiff alleged he was not hired nor did

any representative plaintiff allege discrimination in the recruiting process.

12. As a result of the forementioned orders, the following class claims were certified and proceeded to trial in this matter:

(a) Discrimination against black employees in the assignment of jobs.

(b) Discrimination against black employees in the denial of job transfer and in the denial of advancement through the operation of the seniority system.

(c) Discrimination against black employees in the selection for supervisory positions.

(d) Discrimination against black employees in the application of educational criteria for selection into salaried positions.

(e) Discrimination against black salaried employees in promotions.

(f) Discrimination against black employees in rates of pay.

(g) Discrimination against black employees in classification.

(h) Discrimination against black employees in testing practices.

(i) Discrimination against black employees in disciplinary and discharge practices.

(j) Retaliation against all persons, regardless of race, because they opposed the Corporation's alleged unlawful employment practices.

II. General Background

13. Plaintiffs' Ekanem and Spicer are black, and Plaintiffs' Marshall and Kemp are white.

14. Defendant, The Health and Hospital Corporation of

Marion County, is a municipal corporation established by the Indiana Legislature in 1954, to provide public health services and facilities to the residents of Marion County, Indiana, as well as medical care for the indigent. The Corporation is governed by a Board of Trustees.

15. Defendant Indiana University and its School of Medicine are state-created schools of higher education. Since 1975, said Defendants have had a management services contract with the Corporation to operate Wishard Memorial Hospital. Pursuant to that contract, the Corporation retains ultimate responsibility for all institutional policies and programs and I.U. cannot change them. Also, the Corporation continues to be accountable for all financial aspects of the Hospital's operations. Futhermore, the contract specifies that it is to be carried out under the operating policies and procedures established by the Corporation including its personnel policies and wage and salary policies.

16. Other named Defendants are (a) divisions or departments of the Corporation or (b) current or former employees of the Corporation.

17. Prior to June, 1978, the Corporation consisted of three divisions, the Division of Public Health, the Executive Division and the Hospital Division. In June of 1978, there was a corporate reorganization and the Executive Division was eliminated. Many of the functions of the Executive Division have been assumed by a headquarter's staff.

18. The Division of Public Health is responsible for the public health of Marion County, and its functions include environmental sanitation, housing inspection, food inspection, restaurant inspection, grocery inspection, license fees, birth and death certificates, and an overall preventative medicine program for the County. The Division of Public Health is located in the City-County Building in downtown Indianapolis, and is the second largest division in the Corporation.

19. The Hospital Division operates Wishard Memorial Hospital (formerly known as Marion County General Hospital) and provides hospital care for the citizens of Marion County, and is primarily charged with the care of the indigent. It is the largest division of the Corporation. Wishard Memorial Hospital is located west of downtown Indianapolis.

20. The Executive Division's function was to provide staff support for the Divisions of Public Health and the Hospital Division, and was responsible for personnel, payroll, data processing, accounting functions, the business office, and loss risk control. The Executive Division was located in the City-County Building where the headquarter's staff is now located.

21. The Corporation generally has in its employ 2800-3200 employees. Approximately 2200-2600 (80%) of these individuals are employed by the Hospital Division (Wishard Memorial Hospital).

22. The President of the Corporation is Thomas Hasbrook. He is white.

23. The highest administrative position within the Hospital Division is held by Mr. William Jenkins. He has held that position since 1976. He is black.

24. The highest administrative position in the Division of Public Health is held by Dr. Frank Johnson, M.D. He has held that position since 1976. He was Deputy Director of the Division from 1970-76. He is black.

25. The Director of Personnel for Wishard Memorial Hospital is Lerona Vorhis. She has held that position since 1978. From 1976-78 she was Personnel Director for the Corporation. She is black.

26. The Affirmative Action Officer for the Corporation is Carol Hunter. She has held that position since 1975. She is black.

27. Other upper level positions at the Corporation are held by the following people:

Elaine Bradley, Compensation Manager (black)
Allan Attaway, Senior Job Analyst (black)
Dr. William Paynter, Medical Director (white)
Shirley Ross, Director, Wishard School of Nursing (black)
Fred Merchant, Director of Internal Auditing (black)
Martina Petersen, Associate Administrator, Nursing Services (white)
Ron Gremore, Personnel Manager, Division of Public Health (white)

28. Andrew Foster, a black, was a member of the Corporation's Board of Trustees from 1972-1976.

29. Since at least 1975, the Corporation has had a Citizens Advisory Council. Members of this Council have included Andrew Foster, Dr. A.D. Pinckney, President of the NAACP and Sam Jones, President of the Indianapolis Urban League, all of whom are prominent blacks in the community.

III. Individuals

Plaintiff Ekanem

30. Plaintiff Ekanem was born in Nigeria, and came to the United States in 1961. He attended Indiana University for undergraduate studies and graduate studies in health administration.

31. Plaintiff Ekanem's employment with the Corporation commenced in October of 1972. His application for employment was referred to the Corporation by the Indiana Employment Security Division. Ekanem had recently received a Master's Degree in Health Administration, was unemployed at the time and was having difficulty in locating a position. He was anxious to secure employment because his visa was soon to expire.

32. Although Ekanem was seeking an administrative

position, the Corporation had no openings of that type at the time. Assistant Personnel Director Donald Demas (white) felt that the Corporation could employ Ekanem in some then available position. Mr. Demas was also interested in hiring Ekanem because he was black since many of the Corporation's hospital employees were unionized and black employees.

33. Ekanem was hired into the Personnel Department as an interviewer, but was paid from a borrowed open budget position of Clerk-Typist.

34. After being hired, Ekanem sent a handwritten letter to Mr. Demas and Mr. Lowery, then the Director of Personnel, expressing his gratitude to them for finding a job in the Corporation for him and thus assisting him with his visa and financial problems.

35. Ekanem's duties in his first position involved interviewing and performing research for the Corporation, including the area of employment of minorities.

36. Ekanem alleges that several white individuals with degrees similar to his were given higher positions and more pay. However, each of those individuals had already been hired by the Corporation prior to Ekanem.

37. On May 20, 1973, Ekanem was promoted from Personnel Interviewer to Administrative Assistant with a salary increase from $206.00 bi-weekly to $314.00 bi-weekly.

38. In 1973, while being considered for the position of Assistant Personnel Director, Ekanem took a psychological profile exam at the request of then Corporate Executive Director Arthur Owen.

39. In 1973, the following individuals being considered by the Corporation for other administrative positions also took psychological profile exams: Mark Shaeffer, Richard Rader, Marvin Kurtz and Charles Robbins. All of these individuals are white.

40. The psychologist's analysis of Ekanem stated, **inter alia**, that he had "a very shaky personality organization;" suffered "deeply rooted feelings of inferiority and of inadequacy" which he placated by seeking a type of symbol or badge of status. Further, that he seemed "more interested in gaining a type of status position rather than finding circumstances that will allow him to discharge his drive. He appears to dislike any kind of challenge." (Ex. AA)

41. Despite this psychological analysis, on January 1, 1974, Ekanem was promoted to Assistant Personnel Director and received a corresponding salary increase from $314.00 bi-weekly to $423.00 bi-weekly.

42. Ekanem's duties as Assistant Personnel Director included evaluation of personnel policies and procedures and recommended changes, as well as reviewing personnel decisions by line management.

43. On December 4, 1974, Mr. Demas and Mr. Ekanem met with AFSCME Union Representative Hershell King. The Union represents many of the Hospital employees. During the meeting Ekanem openly aligned himself with the Union on the issues discussed.

44. In previous instances, Ekanem had disclosed confidential information to the Union and had taken positions contrary to management.

45. Ekanem had been counselled about the need to cooperate with other members of management and the need to work more closely with management.

46. As a result of Ekanem's pro-Union attitudes, he was transferred from the Personnel Department. Since Ekanem had a degree in health administration, the Corporation felt his abilities were better suited to an administrative position in the area of health services as opposed to personnel. In January, 1975, he was transferred to the position of Deputy Administrator of the Community Developmental Health Program (CDHP).

47. After Ekanem was transferred from the Personnel Department, the Union sponsored a petition encouraging the Corporation to place Ekanem back in the Personnel Department, and Union President Frazier sent a letter to a member of the Corporation's Board of Trustees in behalf of Ekanem.

48. On February 11, 1975, Ekanem filed a charge with the Equal Employment Opportunity Commission against the Corporation alleging his transfer from personnel to CDHP to be retaliatory.

49. With Ekanem's transfer to the Deputy Administrator position at CDHP came a salary increase of approximately $3,000.00. Additionally, he received his own office, a prerequisite that he did not have in his previous position.

50. In an affidavit filed with this Court on June 12, 1978, Ekanem stated under oath that he considered his transfer to Deputy Administrator of CDHP a "promotion."

Plaintiff Marshall

51. Plaintiff Marshall was first employed by the Corporation in February, 1970, as a Clerk in the information section of Wishard Hospital.

52. Between 1973 and 1976, Marshall was a Union Steward and involved on a daily basis with the handling of grievances on behalf of employees of the Corporation. Most of the employees in the bargaining unit represented by the Union were and are black.

53. In 1974 Marshall went to the NAACP with an employment discrimination complaint. On September 4, 1974, the NAACP filed a third party charge of employment discrimination on her behalf and on behalf of others with the EEOC.

54. At all times material, Section 8.3(c) of the EEOC Compliance Manual has provided that third party

certification of charge forms will not be made available to a respondent employee and that the name and identity of the person on whose behalf the charge is filed shall be confidential.

55. When the 1974 NAACP charge filed with the EEOC was served on the Corporation, no third party certification form was with it.

56. Prior to the filing of the 1974 NAACP charge with the EEOC, Marshall attended a meeting at the NAACP offices on August 20, 1974. Also in attendance among others, were Ekanem, the EEOC District Director Osma Spurlock, and A.D. Pinckney, President of the NAACP. At this meeting, the NAACP agreed it would file an EEOC charge. The minutes of this meeting state: "The name of the people involved will never have to be given to the Hospital." (Ex. BW)

57. The Corporation did not learn until the 1978 Preliminary Injunction hearing in this case that Mrs. Marshall was one of the parties on whose behalf the NAACP charge had been brought.

58. In February, 1976, Marshall sought a transfer to CDHP. Her transfer request form stated that her reasons for seeking the transfer were increased salary, better hours, and chance for advancement.

59. Marshall's transfer to CDHP was approved by her then department head Vernetta Rhodes (black) and her new department head Edgar Allen (black) and became effective March 8, 1976.

60. On April 27, 1976, Marshall was promoted from a Clerk position to an Administrative Secretary position and received a salary increase of $40.00 bi-weekly.

61. In February, 1977, with the closure of CDHP as described hereafter, Ms. Marshall transferred to Tamarack with full seniority and all benefits.

62. Also in February, 1977, Ms. Marshall received a favorable evaluation and a 6% pay increase while at Tamarack. She subsequently received another favorable evaluation.

63. On January 25, 1978, Ms. Marshall received yet another favorable evaluation plus an 8% merit increase.

64. On October 24, 1978, the Corporation gave Ms. Marshall a commendation for her skill and merit.

65. On January 7, 1979, Ms. Marshall received a salary increase from $338 to $349.52 bi-weekly.

66. On February 18, 1979, Ms. Marshall received a 10% merit pay increase.

67. On September 24, 1979, the Corporation granted Ms. Marshall a maternity leave. She returned from this leave on November 26, 1980.

68. On October 28, 1979, Ms. Marshall was promoted from Secretary to Administrative Secretary and received a salary increase from $384.40 to $411.20 bi-weekly.

69. On January 1, 1980, Ms. Marshall received another salary increase from $411.20 to $432.00 bi-weekly.

70. On January 14, 1980, Marshall was granted a personal leave of absence to be with her ill child. She returned from this leave on February 25, 1980, and continues to work for the Corporation as of this date.

71. On September 19, 1980, four days before this trial commenced, Marshall received an excellent performance evaluation and was recommended for a promotion and pay increase.

72. Ms. Marshall has never received a poor evaluation from the Corporation.

Plaintiff Donald Kemp

73. Plaintiff Donald Kemp (white) was first employed by the Corporation in October, 1970. He subsequently left

the Corporation's employ in April, 1971, but resumed employment in June, 1971, as a patient interviewer.

74. At one time, Plaintiff Kemp's Supervisor was Gracie Cash, a black female.

75. In January, 1972, Plaintiff Kemp was promoted by the Corporation to supervisor of the Business Office.

76. Plaintiff Kemp supervised and trained several employees, including black employees.

77. Plaintiff Kemp recommended two black employees for promotion; Rita Bell and Charles Terry. Both black employees were promoted.

78. After suffering a series of heart attacks, Plaintiff Kemp transferred to CDHP and was promoted to the position of Health Project Associate on November 15, 1976. His pay was also increased from $284 bi-weekly to $328 bi-weekly.

79. When CDHP closed-out, as described hereafter, Kemp talked with Personnel Director Vorhis and decided to take disability retirement rather than seek transfer to another position.

CDHP Program

80. In 1973 the City of Indianapolis contracted with the Corporation for the Corporation to serve as the prime sponsor for several health centers located within the City. The Corporation administered this program through its CDHP office in the Division of Public Health.

81. Said health centers were funded with Federal monies received by the City and passed through the Corporation to the neighborhood health centers. The various health centers were not part of the Corporation, but governed by independent neighborhood boards.

82. The contracts between the City and the Corporation concerning the sponsorship of these health centers were annual.

83. Beginning in the Summer of 1976, intra-corporate discussions were held concerning problems of the Corporation's sponsorship of the health centers and the contract with the City.

84. The Corporation was concerned because it had responsibility and potential legal liability, but no authority over the fiscal and medical management of the health centers. The Corporation was also concerned because there was no medical audit, no standard personnel policies, and no standard wage or salary policies. The health centers were run on a reimbursable basis and the Corporation was, in fact, being placed in the position of an interest free loan company for the health centers. This resulted in cash flow problems because the Corporation was carrying the centers out of its general fund for as much as one-half million dollars.

85. These concerns and proposals for a new method of operation for the health center programs were embodied in a written internal corporate memoranda. The Corporation proposed not only that it be the sponsor of the centers, but that it have the authority to make decisions with respect to the centers, rather than being subjected to the decisions of the various independent outside governing boards. This proposal was eventually put in writing and submitted to the Deputy Mayor of the City.

Closing of CDHP

86. The City rejected the Corporation's proposal for operation of the health center program and contacted Methodist Hospital of Indianapolis regarding sponsorship of the program.

87. The 1976 contract between the City and the Corporation for the health centers expired as of December 31, 1976. Because Methodist Hospital could not be prepared to take over the program as of January 1, 1977, the City requested that the Corporation operate the

program for an additional month. The parties entered into a written contract for an additional month's operation.

88. At this time the Corporation employed six individuals in the CDHP office: Edgar Allen, Administrator (black), Plaintiff Alfred Ekanem, Deputy Administrator (black), Beulah Kemp, Evaluation Analyst (black), Plaintiff Linda Marshall, Administrative Secretary (white), Beatrice Dycus, Clerk/Typist (black), and Plaintiff Donald Kemp, Health Project Associate (white).

89. With the Corporation's loss of the contract for the sponsorship of the health center program the role of the CDHP was eliminated and there was no further need for that office within the Corporation.

90. Employees in the CDHP office were informed verbally by Edgar Allen on or about January 4, 1977, of the impending shutdown of the office. Some of them had learned as early as December, 1976 that the CDHP office might close down.

91. Thereafter, on January 11, 1976, Director of Personnel, Lerona Vorhis, sent a letter to Edgar Allen outlining the Corporation's transfer policy which was that the Department of Personnel would accept transfer requests and make referrals to department heads who had posted openings in the employment services area, but that any employment decision was left to the department head.

92. On January 20, 1977, Mr. Chauncey, then Deputy Executive Director of the Corporation, issued a letter to all employees in the CDHP giving them formal written notice of the CDHP phase-out. In the letter he briefly described the reason for the close out and confirmed Ms. Vorhis' previous statement regarding transfers. Chauncey stated that upon application to other vacant positions within the Corporation their applications would be reviewed for a decision by line management of the department involved.

93. Upon learning of the CDHP closeout, Ekanem filed a transfer request form on January 7, 1977. He subsequent met with Ms. Vorhis in the Personnel Department to review available openings. She informed him of an assistant administrators job opening at Wishard Memorial Hospital and advised him to check postings on the job board.

94. On January 24, 1977, Ms. Vorhis sent memoranda to Mr. Allen and Mr. Ekanem regarding application for the assistant administrators opening at Wishard Memorial Hospital. She requested that both gentlemen make future contact concerning the opening to William Jenkins, the Hospital Administrator.

95. Ekanem applied for the Assistant Administrator's job in the Hospital Division. In February of 1977, Mr. Jenkins held a one and one-half hour interview with Ekanem with respect to the assistant administrators opening at Wishard. He subsequently held a follow-up interview.

96. Jenkins was seeking an individual with extensive hospital experience and a good educational background. Jenkins interviewed six or more individuals for the position and selected Frank Yacone (white) because of Yacone's education and 12 to 14 years of hospital experience. Jenkins did not choose Ekanem for the position because of Ekanem's lack of hospital experience. Ekanem had never been employed in the Hospital Division and had no hospital administrative experience prior to his employment with the Corporation.

97. Ekanem did not apply for any other positions within the Corporation.

98. After learning of the impending closeout of the CDHP office Plaintiff Marshall also filed a transfer request form on January 7, 1977. Marshall was referred to the Community Health Center (Tamarack) for possible employment. There she was interviewed and offered a

position. Marshall, however, stated she could not accept the job until it had first been posted for five (5) days pursuant to the union contract and Corporate practice.

99. Marshall's last date of employment in the CHDP office was February 2, 1977. On February 2, 1977, CDHP Administrator Allen met with Marshall and confirmed CDHP and her job were being abolished. Allen told Marshall the paperwork for her to start work at Tamarack was being started and she would start work at Tamarack on Monday February 7, 1977, (Ex AF) on February 4, Marshall met with Ms. Vorhis in the personnel office and was informed that her transfer request to the mid-town Community Health Center (Tamarack) had been approved and that she would continue her original seniority date. The transfer was effective February 6, 1977.

100. As noted above in paragraphs 62 through 71, Ms. Marshall has continued to receive good evaluations, promotions and substantial pay increases since transferring from CDHP in February, 1977.

101. Marshall continued to work at Tamarack until it was phased out in July, 1979, at which time Marshall was transferred to the Community Involvement Center where she presently works. Both Tamarack and the Community Involvement Center were within the same Department.

102. Plaintiff Donald Kemp (white) had a history of heart problems and when CDHP closed out he chose to take disability retirement rather than seek a transfer.

103. Beatrice Dycus (black) of the CDHP office sought a transfer to the Bureau of Community Health Nursing at the time of the closure of CDHP and such transfer was granted effective February 2, 1977.

104. Edgar Allen and Beulah Kemp (both black) remained on after February 2, 1977 to close out the CDHP office. Allen was the Administrator of the Program and Kemp was the Evaluation Analyst.

105. After the closing of the office, Allen sought a transfer to an Administrative Assistant position in Wishard Hospital, was interviewed by Jenkins and accepted for the position. Ms. Beulah Kemp sought a transfer to another position and was accepted.

106. All of the above requests for transfer were handled in accordance with the corporate transfer policy.

107. Plaintiffs Ekanem, Marshall and Kemp each filed an EEOC charge on or about February 3, 1977 alleging the loss of their jobs at CDHP was retaliatory. In addition, Kemp and Marshall, both of whom are white, claimed their loss of job was also due to their race (white).

Corporate Transfer Policy

108. The transfer policy of the Corporation is stated in its Personnel Policy Ordinance in Section 1.6(b) and has been in effect at all times material herein. The policy provides that if an employee seeks a transfer, it must be approved by the head of the department from which the employee is leaving, and also approved by the head of the department to which the employee seeks transfer.

109. This transfer policy has been uniformly applied by the Corporation at all times material herein and was so applied in the cases of the transfers described herein.

110. In the past, when the Corporation has phased out or closed a program, employees of that program were permitted to seek transfers to open positions. If they were qualified and if they were accepted by the head of the department to which they sought the transfer, employees of phased out jobs received transfers to the extent that the number of employees did not exceed the number of vacancies.

111. Not all employees of closed out programs have been absorbed by the Corporation through the transfer procedure. In 1970 when the Corporation phased out

Project BB for model cities, employees William Bronson, Paul Roberts, Dean Merrill and Jack Smith were not re-employed.

112. In 1973, when the Corporation's Martindale Health Center was phase out, the following employees of the Corporation working at Martindale were not re-employed: Lillian Stevenson, Vera Samuels, Alma Collins, Mary Ross, Birdie Oakley, Odessa Rice, Richey McCombs, Ethel Williams, Viola Caldwell, Brenda Downs, Donna Sanders, Valetta Ratcliff, Mary Jones, John Griffin, Anne Bolling and Georgia Stephens.

113. In 1977, when the Corporation's Barrington Health Center was phase out, the following employees of the Corporation working at Barrington were not re-employed: Jamie Solomon, Ruth Robinson, Wanda Strader, Raymond Mitchell, Judy Davis, Johnetta Etta, Velvalyn Ayers, Claudine Johnsone and Jean Bracken.

114. Other employees of the Corporation who were not re-employed when their position was phased out or eliminated include, in 1975: Don Boehme, Assistant Administrator; in 1976, Jack Fougerousse, Assistant Administrator; in 1978, Gloria Gresham, Planning Direction, and Dr. Eugene Taylor, Director of the Dental Project.

Ekanem's Re-employment

115. On June 12, 1978, Plaintiffs filed a Motion for Preliminary Injunction seeking, *inter alia*, reinstatement and backpay for Ekanem pending trial on the merits. Following a lengthy hearing, this Court granted Plaintiffs' Motion for a Preliminary Injunction reinstating Ekanem and prohibiting retaliation by the Corporation against Marshall and other employees in its Order dated August 18, 1978. Defendants sought and received a stay Order from the Court of Appeals. On October 4, 1978, after the Seventh Circuit Court of Appeals dissolved its stay order,

Ekanem was re-employed by the Corporation pursuant to this Court's order. He was re-employed in the position of Administrative Assistant in the Division of Public Health. On December 21, 1978, the United States Court of Appeals for the Seventh Circuit reversed this Court's Preliminary Injunction and the reinstatement order of Ekanem. *(Ekanem v. Health & Hospital Corp.*, 589 F.2d 316 (7th Cir. 1978)) However, the Corporation continued Ekanem in its employ.

116. In the Division of Public Health, Ekanem's Supervisors were Dr. Frank Johnson (black), Director of the Division and Steven Root, Administrator of Public Health Programs (white).

117. When Ekanem returned to work at the Division of Public health he met with Dr. Johnson. Dr. Johnson stated he was not interested in Ekanem's pending lawsuit and Ekanem's charges against the Corporation. Dr. Johnson and Ekanem agreed to mutually respect each other. Johnson asked for Ekanem's word and they shook hands on it. (Ex. 460, p. 62-63)

118. Dr. Johnson made an effort to introduce Ekanem in a positive way to staff when Ekanem returned to employment in October, 1978. (Ex. 460, p. 84)

119. Dr. Johnson instructed Steven Root, Ekanem's immediate supervisor, to treat Ekanem fairly, the same as he would any other employee.

120. In January or February, 979, Dr. Johnson selected Ekanem to be a member of a planning committee.

121. On February 28, 1979, Ekanem wrote a letter to Dr. Frank Lloyd, Director of Medical Research at Methodist Hospital in Indianapolis (a black) indicating that the Corporation's black officials and administrators William Jenkins, Lerona Vorhis, Carol Hunter and Dr. Frank Johnson, were "accommodating blacks" and that they had no influence or authority in the Corporation. He

further implied that they needed help or "protection from outside sources". The letter was written without the knowledge or consent of the Corporation's officials and administrators named therein and contained what this Court considers to be scurrilous matter.

122. Several employees in the Division refused to work under or with Ekanem. Two of the most outspoken were Georginia Rowland (white) and Jean Daniels (black).

123. On April 9, 1979, Plaintiffs filed a Supplemental Memorandum in Support of Plaintiffs' Motion That Action Be Maintained As A Class Action Pursuant To Rule 23(b)(2) which stated, *inter alia*, that as of January 1, 1979, there were 600 "Categories of Officers, Decision-Makers and Administrators", all of whom were white. (Ex. CS) This statement was and is extremely misleading and grossly untrue. Ekanem gathered these statistics in February, 1979, the same month he wrote the aforementioned letter to Dr. Frank Lloyd, wherein he referred to Dr. Johnson and other black Corporate officials as "accommodating blacks". When questioned as to why he did not include Dr. Johnson among the 600, Ekanem testified he did not consider Dr. Johnson to be an "officer, decision-maker and administrator" but rather, a mere "agent" of the Corporation or a "professional slave".

124. On May 18, 1979, Dr. Johnson announced a reogranization of the Public Health Programs. When Steven Root asked to speak with Dr. Johnson about the reogranization, Dr. Johnson told him he saw no point in discussing it since the reorganization was final.

125. Dr. Johnson's reorganization chart provided that he and the Administrator of Programs (Mr. Root at the time) would have direct line authority over five (5) support service units as follows:

(a) Administration unit with a unit administrative assistant in charge.

(b) Vital records unit with a unit manager in charge.

(c) Education and Public Information unit with a unit manager in charge.

(d) Management Systems unit with a unit manager in charge.

(e) Public Health Planning unit with a unit manager in charge.

126. Ekanem felt that Dr. Johnson had selected him to be the administrative assistant in charge of the Administration unit under the reorganization and testified that Dr. Johnson asked him if he felt the responsibilities of the person in charge of that unit were greater than the title "administrative assistant". Ekanem testified that he requested to be able to respond to the question in writing. Ekanem had worked as an administrative assistant within the Administrative unit since his reinstatement in October, 1978.

127. On May 30, 1979, Ekanem delivered a 25 page memorandum to Dr. Johnson. The memorandum was under a gold seal with Plaintiff Ekanem's name embossed on it. In the memo Ekanem objected to his placement by Dr. Johnson on the organizational chart and stated that his position should be higher. He also informed Dr. Johnson that he could supervise the rest of the staff and proposed that he be Deputy Administrator with direct line authority over each of the five units. Ekanem claimed that he was more qualified than anyone else and gave comparative staff salaries and histories. Ekanem concluded by recommending just what his position should be, what authorities he should have, and what salary he should have. This would have created a new position of Deputy Administrator of Health Care Programs. In addition, he informed Dr. Johnson that in this new position he would need an Administrative Assistant immediately and submitted a job description for one.

128. Rather than respond to the appropriateness of his current title under the chart, Ekanem's May 30, 1979

memorandum proposed significant changes in the reorganization that Dr. Johnson had already finalized. The general nature of the memorandum is one which places Ekanem in a position of being more knowledgeable than Dr. Johnson.

129. As a result of all of the above, on June 1, 1979, Dr. Johnson requested Ekanem's resignation. In his memo requesting the resignation, Dr. Johnson reviewed his own responsibilities as Director of Public Health, and stated to satisfy these responsibilities he needed a team of appropriately trained, dedicated and coordinated personnel. He stated these persons must be deployed in accordance with a plan as perceived by Dr. Johnson and in keeping with the administrative and public principles. Dr. Johnson stated that Ekanem's acts indicated that he was unable to carry out the mission if he were to remain in the Division's employ. He outlined these acts as (1) dilution of authority, (2) creation of an atmosphere of distrust, (3) hostility and acts of disloyalty to the Corporation, and (4) improper supportive attitude to the Corporation.

130. Ekanem refused to resign and effective June 10, 1979, Dr. Johnson terminated him.

131. Dr. Johnson did not consult with anyone from the Corporation or any of the Corporation's legal advisors before terminating Mr. Ekanem's employment. The decision to terminate Ekanem was made solely by Dr. Johnson. (Ex. 460)

132. Dr. Johnson considered Ekanem was questioning his authority and ability as a health officer and that Ekanem attempted to minimize his responsibility to the community. Dr. Johnson did not see Ekanem as a viable member of the team allowing him to perform Dr. Johnson's legal duties as a health officer. (Ex. 460)

133. Prior to these 1979 events Ekanem had written letters to the Department of Health, Education and Welfare (Ex. CI); President Gerald Ford (Ex. 322); and

President Jimmy Carter (Ex. CF). In these letters he characterized the black officials of the Corporation as "professional slaves". He also made accusation against the Corporation that it treated patients like wild specimens; used them for experimental purposes analogizing the Hospital's activities to occurrences in Nazi Germany during World War II; reopened surgical wounds and thrust knives and other instruments into them; and drained spinal fluid with "giant needles" such that patients could no longer walk upright. He also had flown to Washington, D.C. to try to get an appointment with President Carter to discuss his claims against the Corporation. He was unable to obtain an appointment. He then wrote a second letter to President Carter (Ex. CG), calling for a Congressional investigation of the Corporation as well as HEW and the EEOC. He believed that the latter two agencies were in "collusion" with the Corporation against him and blacks.

134. On August 17, 1979, Ekanem filed a charge of discrimination with the Equal Employment Opportunity Commission concerning his June 10, 1979 termination, alleging that it was retaliatory and discriminatory based on his race.

Plaintiff Toni Hardiman Spicer

135. Toni Hardiman Spicer was employed by the Corporation on April 11, 1973, in the position of telephone operator at the Hospital.

136. Between May of 1973 and August of 1974, Ms. Spicer received numerous verbal and written warnings, counsellings and disciplinary actions concerning her work performance, many of which she signed. They are as listed below:

May 8, 1973;
June 22, 1973;
August 24, 1973;
September 6, 1973;

September 21, 1973;
February 15, 1974;
February 19, 1974;
March 18, 1974;
March 31, 1974;
April 14, 1974;
May 28, 1974;
June 5, 1974;
June 14, 1974;
June 25, 1974;
July 3, 1974;
July 8, 1974;
July 10, 1974;
July 11, 1974;
July 12, 1974;
July 29, 1974;
July 30, 1974;

Among the many incidents that Spicer was disciplined for were:

(a) sleeping on the job.

(b) telling her supervisor to "shut up," that she would "slap the shit out of her," that "one of us will go out the door."

(c) calling physicians "honey" and "babe".

(d) eating and drinking at the switchboard.

(e) absenteeism.

137. On July 28, 1974, Spicer was observed sleeping on the job. This was reported by fellow black operator Kay Merriweather. She has been found sleeping on the job on previous occasions also.

138. On August 1, 1974, Ms. Spicer was given a letter of discharge due to her many reprimands and warnings regarding her job performance, as well as sleeping on the job. Ms. Spicer has been progressively disciplined and warned about her work performance and that it could result in her termination.

139. On August 5, 1974, Ms. Spicer filed an EEOC charge over her termination, claiming it was racially discriminatory.

IV. Class Claims

Class Definition

None of the four named plaintiffs has alleged as an individual claim in the amended complaint an unlawful or discriminatory act with respect to any of the following class allegations: pay, classification, assignment of jobs, denial of advancement through operation of a seniority system, selection for supervisor, or application of educational criteria for selection into salaried positions.

140. The applicable beginning period of inquiry for each class claim under Title VII begins 300 days prior to the earliest charge filed relevant to a particular class claim.

141. The class claims, earliest EEOC charge filed and the beginning date of the applicable period of inquiry under Title VII are as follows:

CLASS MEMBERS AND CLAIMS

Sub Class A. All black employees who have been adversely affected by any of the following practices:

Class Allegation Date	Earliest EEOC Charge	Beginning Date of Inquiry
1. Promotions	None	
2. Denial job transfer	Ekanem—2-3-77	4-3-76
3. Classification	None	
4. Pay	None	
5. Testing	Ekanem—2-11-75	4-11-74
6. Discipline-demotion	Spicer—8-5-74	10-5-73
7. Assignment of jobs	None	

8.	Denial advancement through operation of seniority system	None
9.	Selection for supervision	None
10.	Application of educational criteria for selection into salaried positions	None

Sub Class B. Retaliation under §704(a) of Title VII against those employees (regardless of race) who opposed discriminatory employment practices.

Earliest EEOC Charge	**Beginning Date of Inquiry**
Ekanem—2-11-75	4-11-74

142. The beginning date of inquiry for class claims under 42 U.S.C. §§1981, 1983, 1985(3) and 1988 is April 18, 1975, that being two (2) years prior to commencement of this action.

Corporate Affirmative Action Efforts

143. In 1974, the Corporation adopted a written Affirmative Action Program, and in January, 1975, Carol Hunter (black) was named Affirmative Action Officer.

144. The duties of the Affirmative Action Officer of the Corporation include investigating employee discrimination complaints, compiling statistics, employee and career counselling, and reviewing job descriptions to ensure that requirements are job related.

145. The Affirmative Action Program contains a discrimination grievance procedure available for use by all employees.

146. The Affirmative Action Program also contains a discrimination procedure entitled "Procedure for Handling Non-Complying Supervisors".

147. At Carol Hunter's suggestion, the Corporation began maintaining a computer printout "Employees By

Job Code", listing race and sex for the first time in September, 1975.

148. The collective bargaining agreements that the Corporation has negotiated with the American Federation of State, County, and Municipal Employees Union (AFSCME) contains a clause prohibiting non-discrimination on the basis of race. The proposal to insert this clause into the collective bargaining agreement was made by the Corporation.

Employment Statistics

149. Since 1973, the Corporation has filed the Government form EEO-4 which lists the number of employees by race and sex for certain job groupings. Carol Hunter, Affirmative Action Officer, has had primary responsibility for compiling the EEO-4 report. In preparing the report Ms. Hunter follows the instructions issued by the United States Government for classification of employees.

150. Employees Elaine Bradley, Compensation Manager (black), and Alan Attaway, Senior Job Analyst (black), of the Wage and Salary Division of the Corporation are responsible for designating EEO-4 categories to job classifications in the Corporation.

151. The Corporation's EEO-4 statistics for 1973 through 1979 reveal the following percentages of blacks in the overall work force:

1973	1974	1975	1976	1977	1978	1979
47.8	40.2	40.8	39.8	40.4	40.2	40.8

152. The Corporation's EEO-4 reports 1973-1979 reveal the following percentages of blacks as new hires:

YEAR	TOTAL NEW HIRES	BLACK	WHITE	OTHER
1974	1088	491 (45.1%)	470 (52.4%)	27 (2.5%)
1975	1043	460 (44.1%)	552 (52.9%)	31 (3%)
1976	893	342 (38.3%)	512 (57.3%)	39 (4.4%)
1977	949	338 (35.6%)	584 (61.5%)	27 (2.8%)
1978	965	392 (40.6%)	549 (56.9%)	24 (2.5%)
1979	806	366 (45.4%)	427 (53%)	13 (1.6%)
Total 1974-79	5744	2389 (41.6%)	3194 (55.6%)	161 (2.8%)

Job Assignment

153. Plaintiffs failed to offer any probative evidence with respect to their claim of discrimination based on race in initial job assignment.

154. Plaintiffs did offer through their expert witness Dr. Liell a series of exhibits analyzing the Corporation's 1973 through 1979 EEO-4 reports. These reports show the number and percentages of minorities within each of the seven EEO-4 categories. Dr. Liell ran an arithmetical calculation to arrive at the "expected number of blacks" in each of the job categories. This was done by taking the total number of blacks within the Corporation's employ and multiplying that percentage by the total number of employees in each job category. His analysis did not take into account availability of qualified blacks in the outside labor market, and furthermore, since the EEO-4 reports are snapshots of the Corporation's employee complement as of June 30 of each year, they co-mingle many employment practices such as promotion, transfer, demotion and, therefore, have little probative value as to the specific question of initial job assignment.

155. Plaintiffs have failed to offer any other evidence that blacks are treated less favorably than similarly situated whites with respect to qualifications and initial job assignment.

156. The Corporation's EEO-4 statistics for the years 1973-1979 reveal that blacks are well represented throughout the Corporation's work force in every EEO-4 job category as set forth more fully below; which is same indicia that blacks are being assigned jobs throughout the Corporation non-discriminatorily.

	Percentage Black By Year						
EEO-4 Job Category	1973	1974	1975	1976	1977	1978	1979
Officials/ Administrators	5.4%	9.3%	8.0%	12.0%	14.4%	10.9%	11.9%
Professionals	14.2%	15.6%	12.9%	13.7%	11.8%	11.8%	11.3%
Technicians	40.0%	35.9%	34.3%	30.6%	30.6%	28.8%	28.5%
Protective Services	---	---	18.3%	14.7%	10.8%	23.7%	36.2%
Para-Professionals	80.4%	79.0%	79.7%	81.8%	82.1%	80.1%	83.4%
Office/ Clerical	40.4%	28.4%	40.3%	41.2%	42.9%	46.8%	48.4%
Skilled Craft	7.5%	10.4%	7.9%	8.0%	11.3%	10.5%	11.0%
Service/ Maintenance	81.8%	71.5%	77.3%	74.1%	73.3%	77.4%	81.9%

Transfers/Advancement Through A Seniority System

157. Transfers within the Corporation are governed by written procedure. The transfer policy is found in Sections 1.7(b) and (c) of the Personnel Policy General Ordinance. This policy provides that transfer requests within a department are made to the supervisor or the department head. Transfer requests from one department to another must be made to the Personnel Department and a transfer request form completed. Before a transfer can be accomplished, the receiving department head, as well as the transmitting department head, must authorize the transfer.

158. Both black employees and white employees have routinely been transferred pursuant to this policy.

159. Plaintiffs presented no statistical evidence on transfers nor with respect to advancement through a seniority system.

160. Plaintiffs did not present any evidence of blacks being denied transfer opportunities or being denied advancement through a seniority system differently than similarly situated white employees. In fact, evidence presented by some of the Plaintiff's witnesses showed that they had, in fact, received transfers. For example, the following blacks requested and received transfers: Beatrice Dycus, Beulah Kemp, Edgar Allen, Arletha Fisher, Debra Ennis.

Supervision

161. Plaintiffs presented no statistical evidence with respect to blacks and whites being selected for supervisory positions.

162. Plaintiffs presented no evidence of any black being treated less favorably than a similarly situated white with respect to selection for supervision. In fact, many of the witnesses presented by Plaintiffs were or had been black supervisors at the Corporation and/or testified about other black supervisors. Among the list of current or former black supervisors found in the evidence presented by Plaintiffs are: Dr. Frank Johnson, Director of Public Health; William Jenkins, Administrator of Wishard Memorial Hospital; Lerona Vorhis, Personnel Director, Wishard Memorial Hospital; Carol Hunter, Affirmative Action Officer; Fred Merchant, Director of Internal Auditing for the Corporation; Elaine Bradley, Head of the Corporation's Wage and Salary Department; Shirley Ross, Director of the former School of Nursing, Wishard Memorial Hospital; Anna Harris, Supervisor for Nurses Aides; Hiram Cushenberry, Supervisor in Pathology;

Andrew Foster, Member of the Corporation's Board of Trustees, 1972-1976; Nettie Taylor, Supervisor of Hospital Transportation; Norman Brown, Personnel Director; Dr. Eugene Taylor, Head of Dental Care Program; Cheryl Edwards, Assistant Head Nurse and Acting Head Nurse, Special Care Nursing; Gertrude Jackson, Nursing Shift Coordinator; Byrdia Turner, Nursing Staff Development; Willa Brooks, Head Nurse; Geneva Warren, Head Nurse; Lucille Phillips, Head Nurse; Daisy Borel, Director of Nursing Staff Development/Quality Assurance; Roy Spight, Administrative Supervisor; Marlene Durham, former Area Supervisor, former Evening House Supervisor and former Assistant Director of Out-Patient; Mrs. Ridley, and Landers, Charge Nurses; Edgar Allen, Deputy Director of CDHP and Director of CDHP and Associate Administrator at Wishard Memorial Hospital; Verna Toler, Chief Pharmacist at Regenstrief Health Center and former Acting Director of Pharmacy Services for Wishard Memorial Hospital; John Clark, Chief Pharmacist at Wishard Memorial Hospital; Vernetta Rhodes, Information Supervisor and Gracie Cash, patient Account Supervisor.

Application of Educational Criteria for Selection into Salaried Positions

163. Plaintiffs presented no probative evidence either statistical or otherwise with respect to this class claim.

Promotions

164. Promotions within the Corporation are governed in much the same way as the transfer policy. The written promotion policy is contained in Section 1.7 of the Personnel Policy General Ordinance. This policy provides that when practical, qualified employees will be upgraded to fill open positions in preference to hiring new people. Criterion considered for upgrading or promotion include job related educational background; training or proven

experience; length of continuous service; ability; past performance, including attitude and attendance; and potential *floor performance in the position.*

165. Plaintiffs presented no specific statistical evidence with respect to the class claim of promotions.

166. Plaintiffs presented no evidence of any black being treated less favorably than a similar situated white with respect to promotions.

167. Defendants' EEO-4 reports indicate that blacks are well represented throughout all EEO-4 job categories Corporation which would be some evidence that blacks have been promoted in the Corporation over the past seven years.

168. Furthermore, many of Plaintiffs own black witnesses testified as to the many promotions they received. For example, Hiram Cushenberry was promoted into the Department of Pathology and as a supervisor in Pathology participated in promotional decisions in that Department; Byrdia Turner was promoted to Staff Development and was offered promotion to six other management or supervisory-type jobs; Roy Spight was promoted from Admitting Officer to Administrative Supervisor; Marlene Durham was promoted from Staff Nurse to Area Supervisor in 1963, then to Evening House Supervisor in 1966, and finally to Assistant Director of Out-Patient Services in 1974. Ms. Durham also participated in promotional decisions while she was a supervisor. Edgar Allen was promoted from Deputy Director of CDHP to Director of CDHP; Verna Toler was promoted to Acting Director of Pharmacy Services and testified that she offered promotions to supervisory positions to other blacks.

169. The question of promotions involve so many individualized matters that each promotion must be considered on a unique basis.

Pay

170. Plaintiffs presented statistical evidence through their expert witness, Dr. Liell, with respect to alleged class pay discrimination. Dr. Liell exhibits showed that, corporate-wide, on average, blacks made less than whites, however, that analysis co-mingles many different labor grades as well as many hundreds of different jobs. Furthermore, Dr. Liell's analysis was limited to a single two week pay period in January, 1980.

171. When Dr. Liell adjusted his analysis for job category (EEO-4) and adjusted for seniority, in seven out of the eight of those job categories he found race not to be a factor in pay.

172. When Dr. Liell further narrowed his analysis to blacks and whites within specific jobs he found that in 26 of the 30 job classifications he reviewed, race was not a factor in pay when adjusting for seniority. In one of the classifications he found race a factor favoring blacks. [In three of the classifications, he found race was a factor favoring whites.] However, these three job classifications only contained a total of 190 black employees as compared to a total of 1,291 blacks employed by the Corporation as of the pay period upon which Dr. Liell's analysis was prepared. (Ex. 208) The 30 job classifications Dr. Liell reviewed were the most populous in the Corporation.

173. Other evidence presented on class pay (Ex. 76, 77) represented pay for all Corporation employees as of 9/30/78. However, these exhibits fail to establish any adverse pattern against blacks and, in fact, in numerous instances black employees were paid more than white employees within the same job.

Classification

174. Plaintiffs produced no probative evidence statistical or otherwise with respect to the class claim of discrimination in classification.

175. Plaintiffs' expert, Dr. Liell, submitted an analysis of the Corporation's EEO-4 reports for the years 1973-1979. In such exhibits, he listed the expected number of blacks in each of the EEO-4 job categories. Dr. Liell's expected number of blacks in each job category was based on a mere arithmetic calculation arrived at by taking the total percentage of blacks in the Corporation's work force, and multiplying that percentage times the actual number of employees in each job category. For example, if in a particular year 40% the Corporation's work force has black, Dr. Liell's expected number of blacks in each job category would approximate 40% of the total employees in that job category. Such analysis has little, if any, probative value, since Dr. Liell failed to take into consideration the availability of qualified minorities in each of the various job groups within the relevant labor market area.

176. Furthermore, it is plain from the Defendants' EEO-4 reports for the years 1973-1979 that blacks are well represented throughout all job categories.

177. Plaintiffs claim that discrimination is shown in that blacks are concentrated in the lower rated EEO-4 job categories while whites predominate in the higher rated EEO-4 job categories. However, Plaintiffs own evidence shows that the overwhelming percentage of applicants for the lower rated categories were black. For example, in April, 1974, nearly 80% of the applicants for the lower rated positions were black. (Ex. CK) Plaintiffs evidence also showed that applicants for the professional and higher rated job categories were white, thus, explaining relative concentrations of black and white employees in the various job categories. Plaintiff presented no evidence that blacks are underrepresented in any job or job category vis-a-vis the availability of qualified blacks in the relevant labor market.

Disciplinary Actions and Discharges

178. The Corporation has work rules or a code of

conduct which are written and contained in Section 3 of the Personnel Policy General Ordinance. This code of conduct sets forth examples of violations which are sufficient to justify disciplinary action up to and including discharge. These rules apply to all employees.

179. Plaintiffs presented no probative statistical evidence with respect to disciplinary and discharge practices of the Corporation.

180. Plaintiff Ekanem testified that there were literally hundreds of thousands of disciplinary actions each year at the Corporation.

181. Plaintiff failed to show any evidence of blacks being treated less favorably than similarly situated whites with respect to disciplinary actions or discharge.

182. Any disciplinary action or discharge action is unique. Each instance involves many variables such as a person's supervisor, a person's shift, person's past employment record, a person's past disciplinary record, and the specific facts which led to the disciplinary action or discharge.

183. The evidence shows that both blacks and whites have received disciplinary actions.

Testing

184. Plaintiffs produced very little, if any, evidence with respect to the class claim of testing. Although Plaintiff Ekanem alleges he was discriminatorily required to take a psychological test in 1974 the evidence shows that at least four (4) whites were also required to do so.

185. Plaintiffs produced no statistical evidence with respects to blacks being treated differently than whites with respect to testing. In fact, Plaintiffs failed to produce any evidence of any testing practices of the Corporation beyond the mere fact that Ekanem was required to take a psychological test in 1974 as noted above.

CONCLUSIONS OF LAW

General

186. This Court has jurisdiction in this action pursuant to 42 U.S.C. §2000e, *et seq.* (Title VII of the 1964 Civil Rights Act), 42 U.S.C. §1981, 42 U.S.C. §1983, 42 U.S.C. §1985(3).

187. Applying the Indiana two year statute of limitations applicable to actions under 42 U.S.C. §1981, §1983, §1985(3), the opening date for the inquiry relative to the Plaintiffs' individual claims under those statutes is two years prior to the filing of this lawsuit or on or about April 11, 1975. Any claims under those statutes arising prior to April 11, 1975 are barred.

188. The time limitation relative to Plaintiffs' individual claims under Title VII is a date 300 days prior to the date a charge of discrimination was filed by each Plaintiff with the EEOC. Plaintiff Ekanem's first charge was filed with the EEOC on February 11, 1975 and, therefore, the cut-off date for his individual claim is April 11, 1974. Plaintiff Marshall and Plaintiff Kemp filed their EEOC charges of discrimination for retaliation and reverse discrimination on February 3, 1977 and their cut-off date on their individual claims is April 3, 1976. Plaintiff Spicer filed her EEOC charge of race discrimination on August 5, 1974 and the cut-off date on her individual claim is October 5, 1973. Any Plaintiffs' individual claims under Title VII arising prior to these respective cut-off dates are barred.

189. At the Preliminary Injuction hearing in this matter lasting five and one-half days in 1978, the Court heard evidence from both parties. This Court's decision on that matter was appealed and the Seventh Circuit's opinion in that regard is reported as *Ekanem v. Health & Hospital Corporation*, 589 F.2d 316 (7th Cir. 1978). The evidence received at the 1978 preliminary injunction hearing has been incorporated into the record evidence of the trial on the merits.

190. Plaintiffs' individual and class claims under Title VII fail as a matter of law against Defendants I.U. and its School of Medicine, Robert van Hoek, Richard Laird, Frank Johnson and Richard Lowery since none of these Defendants were ever named as respondents in any EEOC charge nor has any right to sue letter been issued to any of the Plaintiffs against any of these Defendants.

Individuals

191. Any claim by Ekanem that he was discriminatorily hired by the Corporation in October, 1972 as a clerk-typist when, at the time, he had a masters degree in health administration is barred by the statute of limitations applicable to his claims. Further, and in any event, Ekanem has failed to carry his burden of proof that such action was discriminatory. The evidence overwhelmingly leads to the conclusion that no such rights of Ekanem have been violated, but rather, that the Corporation's hiring of Ekanem, at a time when he could not find employment and was about to lose his visa, was a considerate act.

192. In *Ekanem v. Health & Hospital Corporation, supra*, the Seventh Circuit ruled that the evidence at the preliminary injunction hearing failed to show that Ekanem's December, 1974 transfer from personnel to CDHP was discriminatory but rather, that the evidence revealed that his transfer was because of his pro-union position. Plaintiff Ekanem has failed to offer any credible additional evidence on this point. Plaintiff Ekanem has failed to sustain his burden of proof that such transfer was discriminatory and the evidence overwhelmingly leads to the conclusion it was not discriminatory.

193. In that same decision, the Seventh Circuit noted that CDHP was closed in February of 1977 because the City of Indianapolis did not renew its annual contract with the Corporation, thus forcing the closing of the CDHP

Department. Plaintiffs did not offer any credible additional evidence on this point. Plaintiff Ekanem has failed to sustain his burden of proof and the evidence overwhelmingly leads to the conclusion that such closure was not discriminatory or retaliatory.

194. With respect to Plaintiff Ekanem's alleged discriminatory discharge in February, 1977, the Seventh Circuit held that the evidence at the preliminary injunction hearing showed Ekanem's job as Deputy Administrator of CDHP was terminated because of the phase-out of CDHP when the City of Indianapolis did not renew its annual contract with the Corporation. The Seventh Circuit noted that this bona fide business reason as well as the time lapse from the filing of his EEOC charge nullified Ekanem's claim of retaliation. Plaintiff Ekanem did not offer any credible additional evidence with respect to this claim. Plaintiff Ekanem has failed to sustain his burden of proof and the evidence overwhelmingly leads to the conclusion that the elimination of Ekanem's job at CDHP was based upon bona fide business reasons.

195. With respect to Ekanem's claim that the Corporation discriminated against him when it did not transfer him to another job after the closing of CDHP the Seventh Circuit noted in its opinion that after the Corporation announced the closing of CDHP, all employees of CDHP were given the opportunity to transfer and that Ekanem applied for "only one other position". The Court went on to note that William Jenkins, the black Administrator of the Hospital, interviewed Ekanem twice for the position, but instead, selected another individual because of his superior educational background and 12-14 years of experience in hospital administration. This Court noted at the 1978 preliminary injunction hearing that Jenkins acted with "objectivity" in selecting the other individual instead of Ekanem. Plaintiff Ekanem has offered no credible additional evidence on this point. Plaintiff Ekanem has failed to sustain his burden of proof

and the evidence overwhelmingly leads to the conclusion that Ekanem was given equal opportunity to transfer with the closure of CDHP and that his non-selection for the only position he sought to transfer to was not discriminatory or retaliatory.

196. With respect to the June 10, 1979 termination of Plaintiff Ekanem, Plaintiff failed to carry his burden of proof of establishing that the termination was discriminatory or retaliatory. The evidence shows that although the Corporation had the opportunity to release Plaintiff Ekanem from his employment in December of 1978 when this Court's reinstatement order was reversed by the Seventh Circuit, it chose not to do so. This fact strongly negates Ekanem's claim that his subsequent termination was retaliatory. The evidence shows a general pattern of perpetual discord Ekanem created by his lengthly letters and memorandums within and without the Corporation containing matters very critical of his employer, reflecting adversely upon management and some matters the Court considers "scurrilous". The evidence shows Ekanem openly displayed and communicated a lack of respect and loyalty for his employer and more recently in 1979 for his superior, Dr. Johnson, by way of his February, 1979 letter to Dr. Lloyd (Ex. 344); his opinion expressed in February, 1979 and at trial that Dr. Johnson was not an "officer, decision-maker or administrator"; and his May 30, 1979 memorandum to Dr. Johnson (Ex. BT). The weight of the credible evidence overwhelmingly leads to the conclusion that Ekanem's June, 1979 termination was not retaliatory, but was rather, for just cause. In light of the evidence as a whole and Plaintiff Ekanem's testimony and demeanor, the Court is unable to credit Plaintiff Ekanem's testimony concerning his 1979 termination.

197. Plaintiff Ekanem has failed to show that he was subjected to discriminatory testing requirements and procedures, that he was discriminatorily and involuntarily

transferred and demoted in December, 1974 or that he was unlawfully discharged on February 2, 1977 or on June 10, 1979 because of his race, color, national origin, or because he opposed discriminatory employment practices. Nor has he proven any other employment discrimination against him during the relevant time period due to his race, national origin or in retaliation for opposing any unlawful employment practices.

198. With respect to Plaintiff Marshall's claim she was unlawfully discharged in February of 1977 and that she has been denied performance evaluations and salary increases, the Seventh Circuit noted in its 1978 opinion that Plaintiff Marshall was continuously employed by the Corporation since 1970 and had remained in its employ. It further noted that she routinely received favorable performance evaluations, salary increases and promotions through corporate transfer procedures and that when CDHP was phase out Marshall received another position and had received favorable evaluations and substantial salary increases since then. The Seventh Circuit then noted that there was no adverse or retaliatory act shown towards Plaintiff Marshall and since evidence of any retaliatory motive or intent was completely lacking there was no substantial likelihood of her prevailing on the merits.

199. Plaintiff Marshall has offered no additional evidence in support of her claims. Indeed, Plaintiff Marshall testified during the trial that she has continued to receive excellent performance evaluations, substantial pay increases and promotions. The evidence she has offered does nothing but buttress the 1978 holding of the Seventh Circuit.

200. Plaintiff Marshall has failed to sustain her burden of proof that she was unfairly denied earned benefits, that she was given burdensome assignments, that unwarranted and negative memos were placed in her personnel file, that she was denied performance evaluations and raises, that

she was harassed by corporate officials, or that she was discharged on February 2, 1977 because she opposed discriminatory employment practices of the Defendants. The evidence overwhelmingly leads to a contrary conclusion.

201. After the Preliminary Injunction hearing in 1978 in this matter, this Court stated that there was no basis to make a finding in favor of Plaintiff Donald Kemp. The Seventh Circuit so noted this District Court's statement in its decision. Plaintiff Kemp has produced no additional evidence in support of his claims. This Court reiterates there is no basis for a finding in Plaintiff Kemp's favor since he has failed to sustain his burden of proof. The evidence overwhelmingly leads to the conclusion that Plaintiff Kemp was not subjected to any discriminatory or retaliatory treatment.

202. At the close of the evidence in the 1978 Preliminary Injunction hearing, this Court held that Plaintiff Spicer had been terminated for just cause and that the record clearly established that. The Seventh Circuit so noted this District Court's statement in its 1978 opinion. Plaintiff Spicer failed to offer any additional evidence with respect to her claims. This Court, therefore, reiterates its previous conclusion that she was terminated for just cause.

203. Plaintiff Spicer has failed to sustain her burden of proof that she was discriminatorily discharged because of her race on August 2, 1974. The evidence overwhelmingly leads to the conclusion that Plaintiff Spicer was not discriminatorily terminated, but rather, was terminated for just cause.

204. None of the Plaintiffs has sustained their burden of proof that their First Amendment rights have in any way been violated. The evidence leads to the conclusion that no First Amendment rights of any of the Plaintiffs have been violated.

205. Plaintiffs claims under §1985(3) fail as a matter of law to the extent that they seek to enforce equal employment opportunity rights. *Great American Savings and Loan Assoc. v. Novotny*, 99 S.Ct. 2345, 19 FEP 1482 (1979). Further, Plaintiffs' claims under §1985(3) fail because they have failed to carry the burden of proving the existence of a conspiracy. All of the actions taken by natural defendants were taken in the normal course of their corporate duties and in connection with corporate affairs and in their official as opposed to individual capacities. A corporation cannot conspire with itself. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972); *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 479 (7th Cir. 1972); *Koehring Co. v. National Automatic Tool Co.*, 282 F.Supp. 282, (S.D.Ind. 1966), *aff'd*, 385 F.2d 414 (7th Cir. 1967).

206. Each of the Plaintiffs failed to carry their burden of proof with respect to their individual claims against each of the Defendant persons named in their individual capacities or named in their official capacities or against the Health & Hospital Corporation or against Indiana University and its School of Medicine under 42 U.S.C. §2000e, *et seq.* (Title VII); 42 U.S.C. §§1981, 1983, 1985(3), 1988 or under the First, Thirteenth or Fourteenth Amendments.

207. Defendants, and each of them, are entitled to judgment in their favor with respect to each of the four named Plaintiffs' individual claims. The facts and the law are with all of the Defendants.

Class Claims

208. Subclass A of the claimed Class includes all *black* employees who have been adversely affected by any of the following employment practices:

promotions
denial of job transfer
classification

pay
testing
discipline-demotion
assignment of jobs
denial of advancement through operation of a seniority system
selection for supervisory positions
application of educational criteria for selection into salaried positions.

209. Neither of the two black Plaintiffs (Ekanem or Spicer) ever filed an EEOC charge alleging discrimination on the basis of race in promotions, classification, pay, assignment of jobs, denial of advancement through operation of the seniority system, selection for supervisory positions, or application of educational criteria for selection into salaried positions. Nor has either of them alleged an individual claim in the amended complaint with respect to any of these matters. Therefore, they cannot be proper class representatives for these alleged class claims under Title VII. Nor can they be proper class representatives for these alleged class claims under any of the other statutes alleged as a basis of jurisdiction. Furthermore, even assuming that they are proper class representatives for these alleged claims, Plaintiffs have failed to sustain their burden of proof as noted hereafter. The evidence clearly shows that the Defendant's employment practices with respect to these class claims do not discriminate against blacks.

210. The beginning periods of inquiry with respect to each class claim under each of the statutes is set forth in paragraphs 141 and 142 of the Findings of Fact above. Alleged class claims arising prior to those dates are barred.

211. Plaintiffs' class claims under §1985(3) fail as a matter of law to the extent they seek to enforce equal employment opportunity rights. *Great American Savings and Loan Assoc. v. Novotny, supra.*

212. Plaintiffs' class claim (as well as individual claims) of retaliation is only cognizable under Title VII and fails as

a matter of law to the extent it is sought to be enforced under §1981, §1983, §1985(3), and §1988. *Walton v. Rockwell International*, 24 EPD ¶31, 266 (C.D.Cal. 1980). Furthermore, even assuming that such class claim is cognizable under such statutes, Plaintiffs have failed to sustain their burden of proof as to such class claims as noted hereafter.

213. Plaintiffs have brought this suit as a class action alleging that the Corporation follows a pattern and practice of discriminating against blacks with respect to the alleged class claims certified by this Court for trial. The Court notes that these class claims are in the nature of "disparate treatment" seeking to show that the similarly situated whites and blacks are treated differently. The United States Supreme Court has stated in *Teamsters v. U.S.*, 431 U.S. 324, 14 FEP 1514, 1519 (1977), that in order to carry their burden of proof, Plaintiffs must establish more than a mere occurrence or isolated or accidental or sporatic discriminatory acts. They must establish by a preponderance of the evidence that it was the Corporation's standard operating procedure, the regular not the unusual practice. The Court concludes that Plaintiffs have failed to sustain this burden of proof with respect to each class claim as the evidence fails to establish any pattern and practice of discriminatory actions against blacks similarly situated to whites.

214. Plaintiffs have failed to establish by a preponderance of the evidence that it is or was a standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to initial job assignments. The simple fact that at any given time, blacks are concentrated in lower rated jobs and whites are more concentrated in higher rated jobs does not of itself infer racial discrimination. *Swint v. Pullman-Standard*, 539 F.2d 77, 94 footnote 40 (5th Cir. 1976); *Lee v. City of Richmond*, 456 F.Supp. 756, 770 (E.D.Va. 1978).

215. Plaintiffs have failed to establish through a

preponderance of the evidence that it is or was the Corporation's standard operating procedure to treat blacks less favorably than similarly situated whites with respect to transfer procedures and advancement through the seniority system.

216. Plaintiffs have failed to establish through a preponderance of the evidence that it is or was the standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to selection of employees for supervision. In fact, many of the witnesses who testified on behalf of the Plaintiffs were or had been black supervisors with the Corporation. Furthermore, the record is replete with blacks holding supervisory positions and some of the highest positions within the Corporation are held by blacks. The evidence overwhelmingly leads to the conclusion that the Corporation does not treat blacks less favorably than similarly situated whites with respect to selection of employees for supervision.

217. Plaintiffs have failed to establish by a preponderance of the evidence that it is or was the standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to the application of educational criteria for selection into salaried positions.

218. Plaintiffs failed to establish through a preponderance of the evidence that it is or was the standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to promotions. In fact, many of the Plaintiff's own witnesses were blacks who had been promoted numerous times within the Corporation. Furthermore, the Corporation's EEO-4 statistics reveal that blacks are well represented in all EEO-4 job categories which would be some indicia that blacks had been receiving promotions within the Corporation. The evidence overwhelmingly leads to the

conclusion that the Corporation does not treat blacks less favorably than similarly situated whites with respect to promotions. Also, since promotions involve a variety of factors unique to each individual seeking a promotion, it is difficult for the Court to consider promotions in a class action fashion.

219. Plaintiffs have failed to approve by a preponderance of the evidence that it is or was the standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to pay. The evidence does not disclose that the pay for similarly situated blacks and whites is substantially different when adjustments are made for seniority and type of job or the actual job performed. Although Dr. Liell testified that within the Corporation, as a whole, black employees made less, on average, than white employees, this fact does not prove pay discrimination based on race. *Roman v. ESB, Inc.*, 7 FEP 1063, 1072 (D.S.C. 1973), *aff'd*, 550 F.2d 1343, 1355 (4th Cir. 1976). Furthermore, Dr. Liell testified that when he did his analysis of the eight major job categories within the Corporation (EEO-4 categories) and adjusted for seniority, he found that race was not a factor in pay in seven out of eight of the job categories. Plaintiff's expert did a further analysis by comparing blacks and whites within the same job, selecting the 30 most populous jobs in the Corporation. He testified that when analyzing these 30 jobs and adjusting for seniority, he found that in 26 of the 30 jobs race was not factor, in one job race was a factor favoring blacks and in 3 jobs race was a factor favoring whites. Such evidence only confirms the Defendants' contention that it does not discriminate against blacks with respect to pay and overwhelmingly leads to the conclusion that the Corporation does not treat blacks less favorably than similarly situated whites with respect to pay.

220. Plaintiffs have failed to establish by a preponderance of the evidence that it is or was the standard

operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to job classification. The thrust of Plaintiffs' argument in this regard is that blacks are concentrated in the lower rated less desirable jobs and whites are concentrated in the professional or higher rated jobs. However, this fact in and of itself does not infer nor establish race discrimination. It is not race discrimination simply because each job or job category within an employer's work force does not approximate the percentage of blacks within its total work force. *Swint v. Pullman-Standard, supra* and *Lee v. City of Richmond, supra.* Furthermore, Plaintiffs own evidence establishes that the vast majority (often more than 70%) of applicants for the lower rated jobs were black while the greater majority of applicants for the higher rated jobs and more professional jobs were white.

221. Plaintiffs have failed to prove by a preponderance of the evidence that it is or was the standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to disciplinary actions and discharge. Plaintiff Ekanem testified that there were literally hundreds of thousands of disciplinary actions occurring at the Corporation each year. Each instance of discipline or discharge involves so many factors that are unique to the disciplinary action or discharge it is difficult to treat this as a class claim. Furthermore, the evidence does show that both whites and blacks received disciplinary actions and discharges.

222. Plaintiffs have failed to establish by a preponderance of the evidence that it is or was the standard operating procedure of the Corporation to treat blacks less favorably than similarly situated whites with respect to testing. Indeed, Plaintiffs presented very little evidence of any testing procedures of the Corporation and certainly nothing to form a basis for a class claim.

223. Plaintiffs have failed to carry their burden of proof

of establishing a pattern and practice of discrimination under a disparate treatment theory against blacks with respect to each of the class claims alleged. Rather, where Plaintiffs offered any evidence in support of the class claim, the evidence clearly establishes that these practices of the Defendants are not discriminatory against blacks.

224. The Court finds that the Defendant Health & Hospital Corporation is one of the leading employers of blacks in the community; is staffed at all levels with representative numbers of blacks, including at the highest level within the Corporation. Further, the Court finds the employment practices of the Corporation to be fair to blacks and not applied differently based upon race. The evidence establishes that the Corporation is an equal opportunity employer.

225. Plaintiffs have failed to carry their burden of proof establishing that the Corporation retaliated against any class of people for opposing discriminatory employment practices in violation of §704(a) of Title VII. Furthermore, any act of alleged retaliation would be dependent upon so many variables that each case would be unique and would have to be handled on a case by case basis, thus, making such a claim difficult to be handled on a class basis.

226. With respect to each class claim under Title VII, 42 U.S.C. §1981 or other statutes alleged, the Court holds that the Plaintiffs have failed to sustain their burden of proving a pattern and practice of disparate treatment and even if a *prima facie* case were presented, the Court finds the evidence overwhelmingly and conclusively shows that no unlawful employment discrimination on the basis of race or retaliation has occurred on a class-wide basis during that time period relevant to this action.

227. Defendants and each and every one of them are entitled to judgment on each certified class claim since the facts and law are with the Defendants and against the Plaintiffs.

228. In the Court's discretion the Plaintiffs would not be awarded punitive damages against any of the Defendants.

229. Plaintiffs have failed to support any claim against any Defendant. Since at least December 21, 1978, when the Seventh Circuit issued its decision reported as *Ekanem v. Health & Hospital Corp., supra*, Plaintiffs were on notice that there was little likelihood of success on the merits of their claims. Plaintiffs nevertheless pressed not only their individual claims but pressed for certification of class claims. As noted herein, during the more than five (5) weeks of trial on the merits of these claims, Plaintiffs proffered little, if any, additional evidence on their individual claims and little, if any, evidence probative of many of the class claims Plaintiffs pressed to have certified. The Court must therefore, conclude that the claims of the Plaintiffs were known to Plaintiffs to lack merit and foundation and to be frivolous at least since December 21, 1978, and that Plaintiffs thereafter pursued such claims and continued to litigate their claims after they were clearly known to be frivolous, unreasonable and groundless. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

230. Defendants are entitled to recover from Plaintiffs the costs of these actions and a reasonable attorneys fee for the defense of these actions. 42 U.S.C. §2000e-5(k); 42 U.S.C. §1988.

Dated: November 28, 1980

/s/_____
Judge, United States District Court

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-2835, 81-1963

ALFRED EKANEM, et al.,

Plaintiffs-Appellants,

v.

THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 77-C-224—William E. Steckler, *Judge.*

ARGUED SEPTEMBER 30, 1982—DECIDED DECEMBER 14, 1983

Before PELL and WOOD, *Circuit Judges,* and HILL, *Senior District Judge.**

WOOD, *Circuit Judge.* This is an appeal from an order dismissing plaintiffs' individual and class claims of employment discrimination at the close of plaintiffs' case in chief pursuant to defendants' motion under Rule 41(b) of the Federal Rules of Civil Procedure. Plaintiffs contend that they made a prima facie case for their claims, that dismissal at the close of their case was therefore im-

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* Honorable Irving Hill, Senior District Judge for the Central District of California, is sitting by designation.

proper, and that the district court's findings were clearly erroneous and contrary to law. Plaintiffs also assign error to the district court's award of attorneys' fees to defendants. Defendants have petitioned this court for an award of appellate attorneys' fees, and have moved that we strike Appellants' Appendix, Volume II from the appellate record. We address only those issues that have been properly raised on this appeal.

I. *Motion to Strike Appellants' Appendix Volume II*

On or about March 16, 1982, plaintiffs-appellants filed a motion with this court for leave to file an oversized principal brief of 75 pages. We denied the motion on March 18, 1982. On March 29, 1982, plaintiffs simultaneously filed a 50-page principal brief, a 322-page appendix, and a 27-page Appendix, Volume II.

Examination of Appendix, Volume II reveals that it is nothing more than a mislabeled brief. Since we agree with the defendants that the Appendix, Volume II is "a readily transparent effort to circumvent the March 18, 1982 order of this Court," we grant the defendants' motion to strike the Appellants' Appendix, Volume II from the appellate record.

II. *Background*

Alfred Ekanem and Toni Hardiman Spicer, both black, and Linda Marshall and Donald Kemp, both white, filed suit under Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1976)) and 42 U.S.C. §§ 1981, 1983, 1985(3), and 1988 against the Health and Hospital Corporation of Marion County, Indiana (the "Corporation"), five officials, and six institutions operated by or associated with the Corporation. The complaint as amended included individual and class claims of racial discrimination in defendants' employment practices, individual claims of retaliation for protesting such

discrimination, and individual claims of violations of first amendment rights.

This case was before this court once before on appeal of the district court's grant of a preliminary injunction ordering the Corporation to reinstate Ekanem and enjoining the Corporation from retaliating against Marshall and any others engaged in activity protected under Title VII. *Ekanem v. Health and Hospital Corp.*, 589 F.2d 316 (7th Cir. 1978) ("*Ekanem I*").[1] We reversed the district court on the grounds that Ekanem and Marshall had failed to show irreparable harm and a substantial likelihood of success on the merits. Ekanem, however, was reinstated to another administrative position prior to the issuance of our decision and thereafter continued in the employ of the Corporation until he was discharged in June of 1979.

Trial on the merits began on September 23, 1980. Ekanem amended the complaint on that day to include first amendment claims and an individual Title VII claim based on his June 1979 discharge. After 26 days of trial, plaintiffs concluded their case in chief and defendants moved for dismissal under Rule 41(b). The district court granted the defendants' motion and requested that the defendants submit proposed findings of fact and conclusions of law consistent with the ruling from the bench. On November 28, 1980, the court issued a written order based on the findings and conclusions submitted by defendants.

At the time of its oral ruling, the court did not discuss the issue of attorneys' fees, or suggest that the suit was frivolous. Nevertheless, the written findings submitted by the defendants and adopted by the court noted that the reversal of the preliminary injunction indicated to the plaintiffs that their claims were "frivolous, unreasonable, and groundless," and concluded that since the plaintiffs

[1] A more complete statement of the background facts appears in our opinion in *Ekanem I*. We will not repeat the background statement in this opinion.

continued to pursue such clearly groundless claims, the defendants were entitled to costs and attorneys' fees. The district court conducted a full hearing on these issues in March and April of 1981. On May 15, 1981, the district court issued its order finding that defendants were entitled to recover attorneys' fees, that their claim in excess of $125,000 was reasonable, but that the award would be limited to $8,000 in consideration of the plaintiffs' ability to pay.

III. *Individual Claims*

Plaintiffs contend that they made a prima facie showing of discrimination and retaliation and thus were entitled to have defendants present their evidence in order to give plaintiffs "a full and fair opportunity" to demonstrate that the defendants' reasons for their actions were merely pretexts for discrimination and retaliation. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). The plaintiffs base their argument on the three-step procedure for trying a Title VII claim that the Supreme Court outlined in *McDonnell Douglas*, 411 U.S. at 802, 804, whereby the plaintiff presents his case and describes the alleged discriminatory acts of the defendant, the defendant explains why his acts were motivated by legitimate considerations, and then the plaintiff explains why the defendant's stated justifications for its actions were merely pretexts for discrimination.

This three-step process is not a rigid framework, however. Rather, it "is merely a model for ordering and evaluating evidence concerning employment discrimination." *Davis v. Weidner*, 596 F.2d 726, 730 (7th Cir. 1979); *see also Gaballah v. Johnson*, 629 F.2d 1191, 1200 (7th Cir. 1980). Thus, it is not necessarily error for a district court to grant a Rule 41(b) motion at the close of the plaintiff's evidence based on the argument that the defendant must present evidence of nondiscriminatory justification for his actions so that the plaintiff may then come

forward again to present evidence of pretext. *See Gaballah*, 629 F.2d at 1200.

Rule 41(b) provides that a district court may dismiss a plaintiff's action at the close of the plaintiff's presentation of evidence if the plaintiff has shown no right to relief under the facts and law. In ruling on a 41(b) motion, the district court must examine and weigh all the evidence, not just the evidence favorable to plaintiff. *Sanders v. General Services Administration*, 707 F.2d 969, 971 (7th Cir. 1983). Applying Rule 41(b) to Title VII cases, dismissal at the close of the plaintiff's case in chief is proper if the plaintiff fails to present a prima facie case of discrimination. Dismissal is also proper if the record at the close of plaintiff's case in chief contains the defendant's reasons for its actions, and if the evidence in the record is sufficient to support a judgment in the defendant's favor. As we noted in *Gaballah*, 629 F.2d at 1200:

> Gaballah's basic contention that a showing of a *prima facie* case under Title VII precluded dismissal at the close of his evidence must fail. . . . [T]he district court was free to proceed to the remaining steps of the *McDonnell* analysis and determine the ultimate issue of whether Gaballah had shown the defendants' reasons to be pretexts for actual discriminatory motivation.

See also Bugg v. International Union of Allied Industrial Workers, 674 F.2d 595, 599 n.6 (7th Cir. 1982); *Holden v. Commission Against Discrimination*, 671 F.2d 30, 36 (1st Cir.), *cert. denied*, 103 S. Ct. 97 (1982); *Correa v. Nampa School District No. 131*, 645 F.2d 814, 816 (9th Cir. 1981); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1281-82 (7th Cir. 1977).

In this case, the district court had before it not only plaintiffs' trial evidence, which included testimony from Corporation officials, but also the record of the hearing on the preliminary injunction, which the parties stipulated was to be part of the trial record. In reviewing the propriety of the district court's Rule 41(b) dismissal, we will

consider all the evidence. We will not overturn the district court's finding that the plaintiffs failed to sustain their burden of proof unless the finding is clearly erroneous. *Sanders*, 707 F.2d at 971.

A. *Kemp and Spicer.*

Kemp alleges that he was discharged in retaliation for opposing discriminatory employment practices. Spicer claims that she was discriminatorily discharged in July, 1974, because of her race. In 1978, the district court denied both Kemp's and Spicer's motions for preliminary injunctions. Neither Kemp nor Spicer appealed the district court's denial of a preliminary injunction as to them, and neither Kemp nor Spicer presented substantial new evidence at the 1980 trial. Not surprisingly, the district court reached the same conclusions after the 1980 trial that it had reached after the hearing on the preliminary injunction. Kemp, like Ekanem and Marshall, was discharged upon the closing of the Corporation's Community Development Health Program ("CDHP"). The district court found that Kemp was not discharged as a result of retaliation, and that Kemp was not denied an opportunity to apply for a transfer, but that Kemp voluntarily chose to take disability retirement on account of his heart condition. The district court found that Spicer had been fired for good cause for sleeping on the job, noting that in the fifteen months of her employment as a telephone operator for the Corporation, she had received numerous warnings about her work performance, including warnings for absenteeism and sleeping on the job. Kemp and Spicer cite no evidence that these findings are clearly erroneous, and, having carefully examined the record below, we conclude that there is none.

B. *Marshall.*

Linda Marshall claims that she was denied promotions and was ultimately discharged as a result of unlawful retaliation. Since the discharge Marshall complains of arises

from the same set of circumstances that one of Ekanem's unlawful discharge claims arises from, we discuss Marshall's retaliatory discharge claim in section C. We consider now Marshall's claim that the defendants unlawfully prevented her from being promoted.

In 1978, when we reversed the district court's preliminary injunction prohibiting retaliation against Marshall, we emphasized the complete absence of evidence of any retaliatory acts toward Marshall, observing that "[s]he routinely received favorable performance evaluations, salary increases and promotions through corporate transfer procedures." *Ekanem I*, 589 F.2d at 321. After noting that Marshall offered no additional evidence during the 1980 trial, the district court dismissed her claims. We have reviewed the record and agree with the district court that Marshall's claims are still entirely unsupported by any evidence.

C. *Ekanem.*

Ekanem claims: (1) race discrimination in his subjection to psychological testing; (2) unlawful discrimination and retaliation in his transfer from Assistant Personnel Manager to Deputy Administrator of CDHP; (3) unlawful discrimination and retaliation in his 1977 discharge upon the closing of CDHP and his failure to obtain a transfer to another position; and (4) unlawful discrimination, retaliation, and violation of his first amendment rights in the discharge following his 1978 reinstatement. Plaintiff Marshall was also discharged upon the closing of CDHP. As noted above, she joins Ekanem in his claim of unlawful retaliation.

With respect to the first claim, Ekanem failed to produce evidence that the Corporation treated him any differently than white employees in subjecting him to psychological testing when he applied for the position of Assistant Personnel Manager—a position that he received in January 1974. On the contrary, the evidence shows that the Corporation also required white employees seeking promotions

to take the psychological test, and Ekanem did not attempt to prove discrimination under a disparate impact theory. The district court properly dismissed this claim.

We addressed the second and third claims in our 1978 opinion, where we held that Ekanem had failed to establish a prima facie case on either of those claims. *Ekanem I*, 589 F.2d at 320. Ekanem failed to present any substantial new evidence in the trial on the merits on his claim that his 1974 transfer from personnel to CDHP was retaliatory, or that his failure to obtain a transfer in 1977 after the closing of CDHP was the result of racial discrimination. Consequently, we affirm the dismissal of those claims for the reasons stated in *Ekanem I*.

The new evidence Ekanem offered at the trial on the merits related to Ekanem's and Marshall's claims of unlawful discharge after the 1977 closing of CDHP. Back in 1978 we found that the Corporation had a bona fide business reason for discharging the CDHP employees that negated any inference of discrimination or retaliation. The reason was that the City of Indianapolis chose not to renew its annual contract for CDHP services with the Corporation and instead granted the contract to Methodist Hospital. *Id.* During the 1980 trial, the plaintiffs presented evidence that in 1980 the Corporation obtained a contract with the City to again provide CDHP services. The plaintiffs used this evidence in an attempt to prove that the Corporation intentionally failed to obtain a contract in 1977 so that the Corporation could discharge Ekanem, Marshall, and Kemp. Evidence of the 1980 contract is insufficient, however, to support the inference that the 1977 closing of CDHP was an act of retaliation against Ekanem, Marshall, and Kemp rather than the result of the City's unilateral action in awarding the contract to Methodist Hospital. For that reason, and for the reasons given in our 1978 opinion, we conclude that the district court properly dismissed Marshall's and Ekanem's claims that they were wrongfully discharged in 1977.

Ekanem's most recent claims concern his 1979 discharge. Pursuant to a district court order, the Corporation reinstated Ekanem in October 1978. He was given the position of Administrative Assistant to Stephen Root, the Administrator of Programs for the Division of Public Health. At that time, Dr. Frank Johnson, the black director of the division, told Ekanem he was not interested in Ekanem's pending lawsuit, and the two agreed to respect each other. Although we reversed the district court's reinstatement order in November of 1978, Ekanem remained in the employ of the Corporation.

In February 1979, Ekanem sent a letter to Dr. Frank Lloyd, Director of Medical Research at Methodist Hospital and a prominent black in the Indianapolis community. Ekanem wrote the letter in response to a local television news report critical of the expense of the office furniture Dr. Johnson had ordered, and featuring comments by white Corporation officials. Ekanem's letter complained about the Corporation's treatment of its black administrators, including Dr. Johnson, and requested that Dr. Lloyd exercise his influence in the community "to protect and help [them] from being reduced to nothingness or termination in [the] Corporation." Ekanem suggested that Dr. Johnson and the other named black officials were being compelled to serve as "accomodating blacks" in the Corporation. Tom Hasbrook, President of the Corporation, obtained a copy of the letter shortly after Ekanem sent it and showed it to Dr. Johnson, but no one took any immediate action against Ekanem. Ekanem acknowledges that he wrote the letter without the consent or knowledge of the individuals named in the letter.

On May 18, 1979, Dr. Johnson announced a reorganization of the Public Health programs and distributed a new organization chart to his staff. According to the chart, Stephen Root was to have direct line authority over the heads of five support service units. Ekanem was to be in charge of the unit made up of the Maternal and Infant Care Program ("M&I"), the Family Planning Pro-

gram, the WIC Program, and Volunteer Services. The new plan was controversial among the staff. Some resented that they would have to go through Root instead of directly to Dr. Johnson, as they had done previously. Others, such as the coordinators of the M&I and WIC programs, did not want to work under Ekanem because of the sharp differences they had had with him over program policies while he was an administrative assistant with no line authority.

On May 30, 1979, Ekanem delivered a 25-page memorandum to Dr. Johnson. In the memorandum, Ekanem discussed his differences with those staff members who objected to working with him, objected to the title of "Administrative Assistant" for his new position, outlined his educational background and prior experience, and proposed that he be designated "Deputy Administrator" to Root with line authority over all five units. Ekanem compared his qualifications to those of the other staff in his unit, noted that his current salary was not significantly different from the salaries of the persons he was to supervise, and requested an additional increase in salary. In addition, Ekanem stated he would need his own administrative assistant as soon as possible, and attached a job description for that position as well as for "Deputy Administrator."

In a letter dated June 1, 1979, Dr. Johnson requested Ekanem's resignation. The letter spoke of the Division's need for "a team of appropriately trained, dedicated, and coordinated persons . . . [who] must be deployed in accordance with a plan as perceived by the Director and in keeping with administrative and public principles." Dr. Johnson stated that Ekanem's acts indicated that his continued employment would not further that plan. The acts cited were: (1) "[d]elusion [sic] of authority"; (2) "[c]reation of an atmosphere of distrust"; (3) "[h]ostility and acts of disloyalty to the Corporation"; and (4) "[i]mproper supportive attitude to the Health and Hospital Corporation." In Dr. Johnson's deposition testimony, submitted by

Ekanem at trial, Dr. Johnson stated that he had been referring specifically to Ekanem's May 30 memorandum and his February letter to Dr. Lloyd. The district court found Dr. Johnson's stated grounds for terminating Ekanem reasonable in light of the considerable evidence that Ekanem's conduct created "a general pattern of discord" and showed a lack of respect and loyalty toward Dr. Johnson and the Corporation. Ekanem does not dispute that he wrote the letter and the memorandum upon which the court based its findings, but asserts that such conduct did not warrant his dismissal and, in any event, was protected. In addition, Ekanem points to testimony concerning a conversation between Dr. Johnson and Mr. Hasbrook, President of the Corporation, in which Hasbrook said "it's too bad we can't fire Ekanem," as proof of pretext.

We cannot conclude that the court's findings on Ekanem's claims of discrimination and retaliation were clearly erroneous. Hasbrook's remarks were made in response to Ekanem's letter to Dr. Lloyd, which characterized Dr. Johnson as an "accomodating black" and a "professional slave" who could not stand up to white Corporation officials without Dr. Lloyd's help. Under these circumstances, and given the evidence that Dr. Johnson acted on his own in deciding to discharge Ekanem, the district court did not err in finding Ekanem had been terminated for the reasons and conduct cited by Dr. Johnson.

Ekanem's contention that his conduct was protected by the first amendment is also without merit. Ekanem's May 1979 memorandum to Dr. Johnson, which defendants acknowledge was "the trigger event for his termination," clearly dealt with internal matters concerning the reorganization of Dr. Johnson's department and Ekanem's proposal for a new position that would give him broader supervisory powers and a higher salary. The memorandum did not comment on matters of public concern such as to warrant first amendment protection. *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Provoda v. Belen Board of Education*, No. 81-1495, slip op. at 4

(10th Cir. May 31, 1983), *petition for cert. filed*, 52 U.S.L.W. 3315 (U.S. Oct. 18, 1983) (No. 83-339); *cf. Jannsaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17, 26 (2d Cir. 1979) (conduct reflecting plaintiff's private ambitions and purposes rather than comment on matters of public concern).

Even assuming, *arguendo*, that the letter to Dr. Lloyd did address matters of public concern under the standards we employed in *Yoggerst v. Stewart*, 623 F.2d 35, 40 (7th Cir. 1980), the letter nevertheless fails to constitute protected speech for which Ekanem may not be discharged. In applying the *Pickering* balancing test, statements directed toward an immediate supervisor that "would seriously undermine the effectiveness of the working relationship" are to be weighed against the employee. *See Pickering*, 391 U.S. at 570 n.3; *see also Janusaitis*, 607 F.2d at 26. The district court implicitly found that the Corporation's legitimate interests in promoting harmony and maintaining discipline outweighed Ekanem's interests in expressing his views in a manner which was both a personal and professional affront to Dr. Johnson. Ekanem's conduct went far beyond the single "passing allusion to the vicissitudes of the boss" found protected in *Yoggerst*, 623 F.2d at 40. The district court correctly concluded that Ekanem failed to sustain his burden of proof with respect to his first amendment claims.

Ekanem, Marshall, and Kemp also claim that the officials of the Corporation violated the plaintiffs' first amendment rights and their statutory rights under 42 U.S.C. § 1983 by adopting a policy prohibiting all plaintiffs from attending public meetings of the Corporation's Board of Trustees. The evidence that the plaintiffs cite does not support their claim. Rather, the documents cited indicate that the policy the plaintiffs speak of was directed to all members of the Executive Division, not to the plaintiffs. Furthermore, nothing in the record supports the plaintiffs' assertion that the Board meetings from which they were excluded were public meetings. The district court properly dismissed this claim.

IV. *Class Claims*

Plaintiffs' class claims were based upon the "pattern or practice" theory of employment discrimination described in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Under that theory, plaintiffs have to demonstrate that the alleged discriminatory practices reflected "standard operating procedure—the regular rather than the unusual practice." *Id.* at 336. Plaintiffs attempted to meet their burden by presenting evidence of individual instances of discrimination and a series of statistical analyses of the Corporation's work force. The district court found that the evidence failed to establish a "pattern or practice" of discrimination, noting, in part, that "evidence of isolated or sporadic instances of alleged racial discrimination will not suffice . . . ." (Tr. 3374). *See Teamsters*, 431 U.S. at 336.

On appeal, plaintiffs contend that the district court based its decision on erroneous legal principles as well as an erroneous view of the facts. In his ruling from the bench, Judge Steckler rejected the statistical evidence offered by the plaintiffs through Dr. John T. Liell for the following reasons:

> Where I disagreed, or rather, where I elected not to predicate a ruling on Dr. Liell's conclusions is the fact that Dr. Liell in confining his analysis and his studies to the work force within the corporation, he gave no consideration to the availability of suitable or qualified personnel within the work force of the metropolitan district.

(Tr. 3371). Plaintiffs are correct, in asserting that the relevant labor pool was to be found within the Corporation, not the outside community. *Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1258 (7th Cir. 1980). Given this error and the district court's failure to take into account evidence factoring in job classification and years of service, we ordinarily would remand for supplemental findings applying the correct legal principles.

Nevertheless, remand is not appropriate in this case since the class lacks a proper representative for most of their class claims, including those for which Dr. Liell presented statistical evidence. From discovery to appeal, defendants have urged that class certification for the claims of discrimination in promotions, job classification, pay, assignment of jobs, denial of advancement through operation of the seniority system, selection for supervisory positions, and application of educational criteria for selection into salaried positions was improper because plaintiffs filed no EEOC charges for those claims, and had no class representatives asserting they had been victims of such discrimination. Although the district court initially rejected these arguments and certified the class, the court accepted defendants' position in its written findings dismissing these class claims. *Ekanem v. Health and Hospital Corp.*, No. IP 77-224-C, slip op. at 45, ¶ 209 (S.D. Ind. Nov. 28, 1980).

The plaintiff class can only raise claims for which they have a representative who is a member of the class, *see General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977), and for which one of the named plaintiffs filed specific EEOC charges, *see, e.g., Jones v. First Federal Savings and Loan Association*, 546 F. Supp. 762, 775-76 (M.D.N.C. 1982); *Muka v. Nicolet Paper Co.*, 452 F. Supp. 491, 493 (E.D. Wis. 1978); *Jones v. United Gas Improvement Corp.*, 383 F. Supp. 420, 426 (E.D. Pa. 1975) (as amended). The plaintiffs assert that they did file class discrimination charges with the EEOC, and, further, that Ekanem was a proper class representative for the pay discrimination claim because the EEOC investigated and allegedly determined that Ekanem had himself been the victim of pay discrimination.

Since plaintiffs Marshall and Kemp are white, only Ekanem and Spicer can be proper representatives for all class claims except the retaliation claim. Spicer filed a discriminatory discharge complaint with the EEOC, but

made no allegations of any other discriminatory acts in that complaint. Ekanem filed two EEOC charges: the first alleged that his 1974 transfer was retaliatory and that his subjection to psychological testing was discriminatory; the second alleged that he was unlawfully discharged in 1977.

Ekanem asserts that his first EEOC complaint, filed in February 1975, and the EEOC determination issued in response to that complaint, provide the necessary jurisdictional base to support the class's pay discrimination claim. Ekanem's 1975 complaint alleged that he was transferred in retaliation for charges he made that the Corporation treated certain black employees unfairly. This same complaint also alleged that the Corporation further retaliated against Ekanem by denying him a Corporation-wide cost of living increase, and by giving him a lower salary than he otherwise would have received in his new position. Ekanem's complaint did *not* allege that Ekanem received a lower salary than he was entitled to as a result of racial discrimination against Ekanem. A charge that a given wage is too low because of unlawful *retaliation* is not the same as a charge that a given wage is too low because of unlawful *race discrimination.* The class cannot, therefore, rely upon Ekanem's 1975 EEOC charge as fulfilling the jurisdictional prerequisite for waging the class's pay discrimination claim.

Neither can the class rely upon the EEOC's March 3, 1977 determination that Ekanem should have received a higher salary after his 1974 transfer. First, the class is limited to claims falling within the scope of charges that the plaintiff formally files with the EEOC—even if the EEOC expands its investigation and right to sue letter beyond the particular allegations appearing in the plaintiff's EEOC complaint. *Badillo v. Central Steel and Wire Co.*, 495 F. Supp. 299, 305 (N.D. Ill. 1980). Moreover, even if we could consider the EEOC determination in deciding whether the class is entitled to wage its pay discrimination claim, the EEOC's determination, like Ekanem's complaint, failed to allege that Ekanem's post-transfer salary was unfairly low because of racial discrimination. Rather,

the EEOC found that Ekanem's allegedly low salary was the product of further *retaliation* for the same acts that allegedly resulted in Ekanem's 1974 transfer. The class does not, therefore, meet the jurisdictional prerequisites for waging its pay *discrimination* claim, or any of the other claims mentioned above that were not the subject of formal EEOC charges.

Courts will not ordinarily decertify a class once its claims have been tried. However, where initial certification was improper or decertification prior to trial appropriate, a judgment on the merits cannot be upheld. *See Rodriguez*, 431 U.S. at 406 n.12; *see also Bishop v. Committee on Professional Ethics and Conduct*, 686 F.2d 1278, 1283, 1285-87 (8th Cir. 1982). Given that none of the named plaintiffs filed EEOC charges relating to the class claims mentioned above, the class lacks an adequate representative for these claims. *See Wakeen v. Hoffman House Restaurants, Inc.*, No. 82-2829, slip op. at 15 (7th Cir. Dec. 13, 1983); *Movement for Opportunity and Equality v. Detroit Diesel*, 18 Fair Empl. Prac. Cas. (BNA) 557, 566 (S.D. Ind. 1978), *aff'd*, 622 F.2d 1235 (7th Cir. 1980). Disposing of the claims in question through decertification was appropriate. *See Falcon*, 457 U.S. at 161; *Wakeen*, slip op. at 17; *Rodriguez*, 431 U.S. at 406 & n.12; *Scott v. University of Delaware*, 601 F.2d 76, 87-88 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

As to the remaining class claims (retaliation, and discrimination in denial of job transfers, testing, and discipline and discharge), we conclude that the district court's findings were not clearly erroneous, and affirm the portion of the judgment pertaining to them. Plaintiffs presented no statistical evidence on the retaliation, discrimination in denial of job transfers, and discrimination in testing claims, and have cited no other evidence indicating error in the district court's findings. The court's dismissal of these claims is therefore affirmed.

With respect to the discrimination in discipline and discharge claim, the only evidence plaintiffs presented to

establish a prima facie case is that a disparity existed between the racial composition of the defendants' work force and the racial composition of 65 employees discharged between September 28, 1979, and November 29, 1980. This evidence is inadequate to establish that it was standard operating procedure of the Corporation to treat blacks less favorably than whites with respect to disciplinary actions and discharge. For each person on the list, which the Corporation provided, the Corporation gave a nondiscriminatory reason for the discharge. Plaintiffs did not attempt to show that the reason given for the discharge of even one of the minorities on the list was merely a pretext for discrimination. The district court did not err in finding that the plaintiffs failed to sustain their burden of proof.

All class claims were properly dismissed.

V. *Attorneys' Fees*

The district court awarded attorneys' fees to defendants pursuant to 42 U.S.C. § 1988 (1976 & Supp. V 1981). The district court based this award upon a finding that the plaintiffs pursued their claims after it had become clear, following our reversal of the preliminary injunction, that the claims were "frivolous, unreasonable, and groundless." *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The plaintiffs contend that their continued efforts to pursue their claims after our 1978 decision vacating their preliminary injunction was not unreasonable and vexatious since they presented additional evidence at trial, and since much of the trial concerned class claims that were not the subject of the earlier appeal. The plaintiffs also point to Ekanem's claims arising from his 1979 discharge both as new grounds for recovery and as evidence supporting the original individual and class claims.

At the post-trial hearing, the court indicated it was proceeding under the theory that a "frivolous" action is one "without any realistic basis for recovery," (Tr. 3658), and concluded that in light of the evidence in plaintiffs' possession, it had been unreasonable for them to pursue their

claims. (Tr. 3684-85). The Supreme Court, however, has cautioned against "the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. In this case, plaintiffs could not have known the likelihood of success on the merits of their claims until they had gathered all of their evidence. The record reveals that defendants contested discovery throughout the proceedings, with one discovery issue left unresolved until the court issued an order to produce only days before trial commenced. As the Supreme Court noted:

> Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 422.

Defendants maintain that our 1978 ruling on the preliminary injunction, and plaintiffs' failure to present substantial new evidence on the claims addressed therein, takes this case beyond the realm of uncertainty described in *Christianburg*. Had plaintiffs been unsuccessful in obtaining certification of their class claims and favorable rulings on the discovery issues, the argument that it was unreasonable for plaintiffs to proceed with a full trial might have some merit. However, given plaintiffs' efforts to bolster both their individual and class claims with statistical evidence, some new evidence concerning the events surrounding the closing of CDHP, and the addition of Ekanem's claims arising from his 1979 discharge, the plaintiffs' pursuit of their claims was not so unreasonable as to justify the imposition of attorneys' fees.

The "pattern or practice" theory of proof set forth in *Teamsters* and its progeny affords plaintiffs wide latitude in attempting to establish circumstantial evidence of

unlawful intent. Plaintiffs were permitted to test that theory to its limits. But plaintiffs had no way of predicting to a certainty what the ultimate results of the case would be since this court had not been presented with the evidence of a "pattern or practice" of discrimination, and since the district court continued to rule in favor of plaintiffs on the discovery and class issues. Although it is a close case, we give the plaintiffs the benefit of the doubt and conclude that the district court abused its discretion in awarding attorneys' fees to defendants.

The district court judgment is affirmed in part and reversed in part. The parties shall bear their own costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

PLAINTIFF'S EXHIBIT 32

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
46 EAST OHIO STREET, ROOM 456
INDIANAPOLIS, INDIANA 46204
TELEPHONE: 269-7212

Ikot Alfred Ekanem 3941 Gateway Court Indianapolis, Indiana 46254	In Reply, Refer to: DIN CHARGE NO. TIN5-0905 CHARGING PARTY
Marion County Health and Hospital Corporation City-County Building Indianapolis, Indiana 46204	RESPONDENT

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met.

Charging Party, Negro, alleges that he was removed from his job as Assistant Personnel Director on December 5, 1974, and involuntarily transferred to the job of Deputy Administrator of Inner City Health Projects because he was an advocate of employees (mostly black) who were treated unfairly by supervisors (mostly white) in discharges, job assignments, discipline and job evaluation. Charging Party further alleges that he protested Respondent's decentralized hiring system, the desire of supervisors to prevent white females in the office from socializing with him or other black males. Charging Party states he was denied a budgeted salary increase from $11,300 to $15,000 per year. He states further on his new job

he was denied the corporation-wide 5% cost of living increase effective January 12th and believes he was hired for $2500 less than his boss would have recommended.

Charging Party maintains that his protest of the payment of a lower salary to a black supervisor than her white subordinates was also held against him. Respondent denies the allegation.

It is undisputed that Charging Party was removed from the Assistant Personnel Director position, December 5, 1974, and was involuntarily transferred to the position of Deputy Administrator, Community Health Programs. It is further undisputed that Respondent considered Charging Party competent between October 1972, his date of hire, and January 1974, the date he became Assistant Personnel Director, because it promoted Charging Party from interviewer to Administrative Assistant, and to Analyst before he was awarded the Assistant Personnel position. It is also undisputed that on numerous occasions Charging Party protested the alleged unfair treatment of blacks by mostly white supervisors in discharges, job assignment, wages and discipline; the fact that employees were hired without coming through the Personnel Department which limited his opportunity to hire qualified blacks; the alleged edict by a white supervisor forbidding the white females in her department to talk to, or eat with Charging Party; the policy of Respondent Personnel Director limiting Charging Party's decision making power, and not supporting Charging Party when his resolution of a problem was challenged by white department heads and supervisors. Finally, it is undisputed that Charging Party's starting salary in his new job was lower than the budgeted salary range for the position.

Respondent maintains in its position letter that it transferred Charging Party because he was having problems understanding his role in the corporation with respect to that of other management officials.

Respondent states that it gave Charging Party a notice, August 30, 1974, warning that he must work harmoniously with the Payroll Supervisor and that Charging Party refused to sign it.

Investigation reveals that the Payroll Supervisor forbade Caucasian females in her department to associate with Charging Party, and that she stated to a Caucasian witness that "Charging Party should be shipped back to Africa where he came from." A policy of Respondent's agent against interracial fraternization is advocacy of segregation of employees in violation of Section 703(a)(2). Respondent is responsible for the orders promulgated by its agents. It is also obligated under this Act to maintain a working atmosphere free of racial intimidation or insult.

Respondent further states that Charging Party's performance review in 1974, "reflected a need for him to develop greater understanding of his role in relationship to the organization, and work more closely with management staff."

Charging Party's evaluation, late in 1973, just prior to his promotion to Assistant Personnel Director reveals that Respondent Personnel Director graded him "A" in judgment, with this comment: Excellent as applied to *labor relations* and most of his administrative duties. Under most significant attributes, the rater states that Charging Party was cooperative, objective in decisions, was honest, had integrity, was capable and worthy of a much higher level position and commensurate salary.

The evidence reflects that in 1974, in a racially tense atmosphere, Charging Party's duties included the review of personnel actions to determine if they met standards of federal and state law. Often policy changes were recommended and discussed with Respondent executives; however, when challenged by the predominantly Caucasian management staff, Respondent disciplined Charging Party and failed to support him. There is

evidence that Charging Party's difficulty with Department heads and supervisors was a product of the relationship between Negro and Caucasian employees. Similarly, given these circumstances, it is reasonable for Charging Party to believe that Respondent's failure to support him in his Assistant Personnel Director role was because of his race.

Finally, Respondent claims that in December, 1974 Charging Party aligned himself with the union representative on a question of interpretation of the collective bargaining agreement as it relates to the grievance procedure.

The union representative testified that the meeting was informal and that similar *informal* discussions had been held many times in the past. The purpose was to discuss past procedure and decide what procedure would be followed in the future. The witness stated that it was coincidental that Charging Party agreed with him because they were at opposite poles on other occasions.

Investigation reveals Charging Party helped conduct seminars for department heads to instruct them how to analyze and process grievances. He was also on the negotiating team for the collective bargaining agreement at Respondent facility. We therefore conclude that Respondent's claim that Charging Party was incompetent with respect to labor relations is not supported by the evidence.

Based on the record as a whole, there is reasonable cause to believe that Respondent retaliated against Charging Party by transferring him in violation of Section 704(a) because he opposed Respondent's alleged discrimination against him and other Negroes because of their race.

Cost of Living Increase

It is undisputed that as early as December 19, 1974, Respondent advised Charging Party's attorney that it was offering Charging Party a salary of $12,500 in his new job.

Records reveal that on January 12, 1975, all employees were eligible for a cost of living increase. We note no change in his salary at that time. We conclude that Charging Party was denied the cost of living increase.

Salary Range on New Position

It is undisputed that the salary range for the Deputy Administrator position was $14,200. It is further undisputed that Respondent transferred Charging Party with a starting salary of $12,532.

We therefore find that Charging Party was hired at a beginning salary lower than the lowest pole of the salary range.

Respondent has advanced no reason for denying Charging Party a cost of living increase and for affixing his salary below the lowest pole of the salary range. Absent other explanations, we find that Respondent further retaliated against Charging Party for opposing alleged discrimination by denying him a cost of living increase in 1975, and by paying him less than the minimum base salary.

Having determined that there is reasonable cause to believe that Respondent is engaging in unlawful employment practices, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. We enclose an information sheet entitled Notice of Conciliation Process for the attention of each party. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On behalf of the Commission:

March 3, 1977 /s/ Osma Spurlock
Date Osma Spurlock
District Director

AMENDMENTS
To The Constitution Of The United States Of America

AMENDMENT 1

Religious and political freedom. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

PLAINTIFF'S EXHIBIT 19

INSTRUCTIONS

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. This charge must be filed with the EEOC within a certain time after the unlawful practice took place. IT IS THEREFORE IMPORTANT TO FILE YOUR COMPLAINT AS SOON AS POSSIBLE. (Attach extra sheets of paper if necessary.)

CAUSE OF DISCRIMINATION

☐ RACE OR COLOR ☐ SEX ☐ RELIGIOUS CREED ☐ NATIONAL ORIGIN ☒ 704(a)

NAME (Indicate Mr., Mrs., or Miss)
Ekot Alfred Ekanem

DATE OF BIRTH
10-12-42

STREET ADDRESS
3941 Gateway Courtius

COUNTY
Marion

SOCIAL SECURITY NO.
312-46-7152

CITY, STATE, AND ZIP CODE
Indianapolis, Indiana 46254

TELEPHONE NO. (Include area code)
297-4527

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME (Indicate Mr. or Mrs.)
Mrs. Howard White

TELEPHONE NO. (Include area code)
255-5179

STREET ADDRESS
5666 Lee Lane

CITY, STATE, AND ZIP CODE
Indianapolis, Indiana 46260

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (If more than one, list all)

NAME
Marion County Health & Hospital Corporation

TELEPHONE NO. (Include area code)
633-3799 (317)

STREET ADDRESS
City County Building

CITY, STATE AND ZIP CODE
Indianapolis, Indiana 46204

OTHERS WHO DISCRIMINATED AGAINST YOU (If any)

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY
☐ YES ☒ NO

DATE FILED

AGENCY CHARGE FILED WITH (Name and address)

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF EMPLOYER OR LABOR ORGANIZATION THIS CHARGE IS FILED AGAINST
More than 15

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day and year)
January 12, 1975

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I believe I was discharged from my job as Assistant Personnel Director on December 5, 1974 and involuntarily transferred to the job of Deputy Administrator of Inner City Health Projects effective January 7, 1975, because I was an advocate of employees (mostly black) who were treated unfairly by supervisors (mostly white) in discharges, job assignments, discipline, and job evaluations. I also disclosed to certain officials unlawful hiring practices. I was thus denied a budgeted salary increase from $11,300 to $15,000 per year.

On my new job (salary $12,500) I was denied the Corporation-wide 5% cost of living increase effective January 12 and I believe I was hired for $2500 less than my boss would have recommended.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE
2-11-75

CHARGING PARTY (Signature)
Ekot Alfred Ekanem

Subscribed and sworn to before this EEOC representative.

DATE
2-11-75

SIGNATURE AND TITLE
Thomas Sides, EOS Supervisor

NOTARY PUBLIC

SIGNATURE AND DATE TO BECOME ME THIS DATE (Day, month, and year)

(Signature (If it is difficult for you to get a Notary Public to sign this, sign your name and mail to the District Office. The Commission will notarize the charge for you at a later date.)

EEOC FORM 5 (5-74) JUN 74 5 Previous editions of this form may be used.

GPO : 1974 O - 535-059

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Office - Supreme Court, U.S.
FILED
JUN 6 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1805

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALFRED EKANEM, et al.,
Petitioners,

versus

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

GREGORY J. UTKEN
ROBERTS, RYDER, ROGERS & SCISM
Suite 2020, One Indiana Square
Indianapolis, Indiana 46204
317/639-5656

Counsel for Respondents

Western Newspaper Publishing Co., Inc., 537 E. Ohio St., Indianapolis, IN

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32pp

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Third Amended Complaint

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1805

ALFRED EKANEM, et al.,

Petitioners,

versus

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents, Health and Hospital Corporation of Marion County, et al., respectfully pray that this Court deny the Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered herein on December 14, 1983 as modified on February 7, 1984.

DECISIONS BELOW

1. *Ekanem v. Health and Hospital Corp.*, 589 F.2d 316 (7th Cir. 1978) (reversing grant of preliminary injunction).
2. *Ekanem v. Health and Hospital Corp.*, 24 FEP 1257 (S.D. Ind. 1980) (decision of trial court on the merits of the lawsuit).
3. *Ekanem v. Health and Hospital Corp.*, 724 F.2d 563 (7th Cir. 1983) *modified and rehearing denied*, 33 FEP 1883 (7th Cir. 1984).

COUNTERSTATEMENT OF THE CASE*

Respondents deem the following brief counterstatement necessary to correct inaccuracies in Petitioners' statement of the case.

Ekanem was hired by the Health and Hospital Corporation in October, 1972 as a personnel interviewer but was paid from a borrowed open budget position of clerk-typist. [24 FEP at 1263, ¶33]. He was unemployed and anxious to secure employment because his visa was soon to expire. [24 FEP at 1263, ¶31].

In January, 1975 Ekanem was transferred from the position of Assistant Personnel Director to Deputy Administrator of a community health program. The Corporation made this transfer because (1) Ekanem, a management representative, had openly aligned himself with the Union on issues and (2) he had a Masters Degree in health administration and the Corporation felt his abilities were better suited in a health services administrative position. [24 FEP at 1263, ¶'s 43-46].

On February 11, 1975 Ekanem filed a charge with the EEOC alleging this transfer to be retaliatory. He did not

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* There are 3 reported decisions arising from this litigation referred to herein. "*Ekanem I*" is the Seventh Circuit's opinion reversing a 1978 preliminary injunction. "*Ekanem II*" is the Seventh Circuit's opinion that is the subject of this Writ. Reference to the District Court's opinion after trial is "24 FEP ____".

allege he had been discriminated against because of race. [24 FEP at 1263, ¶48]. Prior to filing his charge, Ekanem had consulted two attorneys. [Tr. p. 189-190, Preliminary Injunction Proceedings, July 6, 1978]. In an affidavit submitted to the District Court, Ekanem stated he considered this transfer to be a promotion. [24 FEP at 1264, ¶50]. *See also, Ekanem I*, 589 F.2d at 320.

In February, 1977 Ekanem and others lost their jobs in the community health program because of a phase-out of that program when the City of Indianapolis did not renew its contract with the Corporation. [24 FEP at 1274, ¶194]; *Ekanem I*, 589 F.2d at 320; *Ekanem II*, 724 F.2d at 569-70. This job loss was found to be non-discriminatory and non-retaliatory.

On August 26, 1980 the District Court certified 10 class claims and excluded applicants and potential applicants from the class. The class was also limited in time period to 300 days before the filing of the first appropriate EEOC charge under Title VII and 2 years before the filing of the suit under 42 U.S.C. §1981 and §1983. [24 FEP at 1269-70, ¶'s 140-142].

At trial, the District Court found against all four Plaintiffs on the merits of each of their individual claims. The Seventh Circuit affirmed these findings. *Ekanem II*.

The District Court also found there was no proper class representative under Title VII for the following class claims: promotions, classification, pay, assignment of jobs, denial of advancement through operation of a seniority system, selection for supervisory positions and application of educational criteria for selection into salaried positions. This was based upon the fact that neither of the two black Plaintiffs ever filed an EEOC charge alleging race discrimination against them on those issues nor had either alleged an individual claim in the judicial complaint on these bases. [24 FEP at 1276, ¶209]. This was affirmed by the Seventh Circuit. *Ekanem II*. In addition, the District Court considered the evidence on the merits of each of those class

claims and found for the Defendants. [24 FEP at 1277-78, ¶'s 213, 214, 216-220, 223-224].

As to the same class claims under 42 U.S.C. §1981 and other statutes, the District Court found Ekanem was not a proper class representative because he had never alleged an individual claim in his judicial complaint on those grounds, [24 FEP at 1276, ¶209], and also that the claims failed on their merits. [24 FEP at 1277-78, ¶'s 213-224 and 226].

As to the class claims for which there were proper class representatives (denial of transfer, testing, discipline and discharge), the District Court dismissed them on their merits. [24 FEP at 1277-78, ¶'s 215, 221, and 222]. This was affirmed by the Seventh Circuit. *Ekanem II*.

SUMMARY OF ARGUMENTS

I

A.

There is no inter-circuit conflict on the scope of an EEOC charge and judicial complaint and Ekanem only disagrees with the District Court's finding which was affirmed by the Seventh Circuit.

B.

Even applying the standard Ekanem suggests for granting of the Writ, his argument fails.

C.

There is no conflict within the Seventh Circuit and an inner-circuit conflict is not an appropriate basis for granting the Writ.

D.

Ekanem was not a proper class representative since he never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay.

E.

The District Court did not apply an erroneous legal stan-

dard in judging the evidence on pay discrimination and it ruled against that claim on the merits.

F.

Unfairness of the lower court's decision is not a proper ground to grant the Writ.

II

Remand of the case under 42 U.S.C. §1981 §1983 was not necessary because Ekanem never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay and the District Court found against that class claim on the merits.

III

The Seventh Circuit's opinion on the First Amendment issue is not in conflict with this Court's decisions.

ARGUMENT

I

A.

The Writ should be denied on the issue of the scope of Ekanem's EEOC charge and judicial complaint because there is no inter-circuit conflict on that question and Ekanem simply disagrees with the District Court's finding which was affirmed by the Seventh Circuit.

The first of three bases that Ekanem cites for granting his Writ is that there is a conflict among the Circuits on the permissible scope of a judicial complaint founded upon an EEOC charge. This contention is inaccurate.

Ekanem cites cases from four Circuits and alleges that the Seventh Circuit's opinion conflicts with them. However, those cases applied the same legal principle which has been called the *Sanchez* doctrine after the case of *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The Seventh Circuit also follows this doctrine. *Jenkins v. Blue Cross Mutual Hospital Insurance*, 538 F.2d 164 (7th Cir. 1976).

In substance, this legal principle is that a judicial com-

plaint under Title VII (42 U.S.C. §2000e, *et seq.*) may cover allegations of discrimination stated in the Plaintiff's EEOC charge as well as other allegations of discrimination that are "like and related" to those in the EEOC charge. None of the cases cited by Ekanem states any other principle and thus there is no inter-circuit conflict. Furthermore, each case cited by Ekanem is distinguishable on its facts.

Ekanem simply seeks to challenge the District Court's finding that he never filed an individual claim of race discrimination with the EEOC over his pay or with respect to the Corporation's pay practices towards blacks in general. As a result, the District Court held that Ekanem was not a proper class representative for alleged pay discrimination against blacks. [24 FEP at 1276, ¶209]. The Seventh Circuit affirmed this finding. *Ekanem II*, 724 F.2d at 573.

Ekanem argues in his Petition that the Seventh Circuit's ruling was "clearly erroneous". [Petition, p. 15]. However, the standards for granting a Writ of Certiorari are not the same as the standards used by appellate courts in reviewing a district court's decision. The Seventh Circuit applied a clearly erroneous standard to the review of the District Court's decision. It did not find the holding that Ekanem never filed an EEOC charge alleging individual race discrimination in pay was clearly erroneous. Ekanem now argues that the Seventh Circuit's opinion is "clearly erroneous", but that is not one of the standards for granting a Writ. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts".).

Whether allegations of a Title VII judicial complaint are "like and related" to Plaintiff's EEOC charge is a factual determination. The facts were found against Ekanem and affirmed on appeal. The Seventh Circuit's determination turns on facts peculiar to Ekanem's case. By disagreeing with that determination, Ekanem does not raise an issue for which the Writ should be granted.

B.

Even Applying Ekanem's clearly erroneous standard for granting of the Writ, his argument fails.

Assuming *arguendo*, a clearly erroneous test is proper, a review of the facts reveals that Ekanem's argument fails even applying that standard.

Ekanem was a highly educated individual with a Masters Degree and a claimed specialty in labor relations. [Petition p. 4]. He alleged he was transferred involuntarily to another job in 1975. Before he challenged that action, he consulted with two attorneys. [Tr. pp. 189-190, Q. 595-601; Preliminary Injunction Proceedings of July 6, 1978].[1] When he filed his February, 1975 EEOC charge, not only did Ekanem not check the box marked "race or color" but a box for "704(a)"[2] was handwritten in and check-marked. [Petitioner's App. p. A-83]. This all suggests the conscious act of an intelligent individual.

The body of the EEOC charge (which *Sanchez* and its progeny note is the "crucial" element, *Sanchez*, *supra*; *Price v.*

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1. The text of that testimony by Ekanem during the preliminary injunction hearing was as follows:

"Q. At the time that you made this transfer I believe you testified earlier you did file a charge with the EEOC about this matter, is that not correct?

A. Correct.

Q. At that time did you contact any attorneys about this problem?

A. Yes, I did.

Q. Who would that be?

A. Mr. Fasig.

* * *

Q. Did you contact any other attorneys about the matter?

A. Mr. Perry Harrold.

Q. Now, is the reason for your contacting these individuals concerning this transfer?

A. That was part of it."

2. § 704(a) of Title VII (42 U.S.C. § 2000e-3) prohibits retaliation for protesting any practice unlawful under Title VII or because of participation in Title VII proceedings.

Southwestern Bell Telephone Co., 687 F.2d 74 (5th Cir. 1982)), does not even allege race discrimination in pay. The charge, [Petitioner's App. p. A-83], fairly read, alleged Ekanem was discharged from one job and involuntarily transferred to another "because I was an advocate of employees who were treated unfairly." The charge says that the employees were "mostly black." That obviously suggests there were employees who were white for which he was also an advocate. Thus, he apparently thought employees (both black and white) were treated unfairly. This is borne out by the fact that of the four Plaintiffs, two were white and two were black. *Ekanem II*, 724 F.2d at 567.

The Seventh Circuit noted in overturning the 1978 preliminary injunction that although Ekanem alleged this change of job to be an involuntary transfer, the facts as presented to the District Court by Ekanem were that he considered it, in fact, a promotion and received a $3,000 pay increase. *Ekanem I*, 589 F.2d at 320. ["Even Ekanem considered his transfer from the personnel position to that of Deputy Administrator of CDHP to be a promotion. (Defendants' App. 3)"]. *See also*, 24 FEP at 1264, ¶50.

Furthermore, the EEOC's determination on that charge indicated no investigation into racially discriminatory pay practices but rather found retaliation. This was also observed by the Seventh Circuit in its first opinion, *Ekanem I*, 589 F.2d at 317 and most recent opinion, *Ekanem II*, 724 F.2d at 573.

Based on these facts,[3] it was not "clearly erroneous" for the Seventh Circuit to conclude that Ekanem never made a claim of race discrimination with respect to his pay or with respect to blacks generally and therefore, he could not be a proper class representative for alleged racially discriminatory pay practices.

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3. Ekanem's argument focuses on the fact he did not check the "race or color" box. However, it is apparent that the Seventh Circuit relied on more than just that fact in reaching its conclusion in *Ekanem II*.

The Writ should also be denied on this issue because there is no conflict within the Seventh Circuit and, further, a claimed inner-circuit conflict is not an appropriate basis for granting a writ.

A second basis Ekanem espouses for granting his Writ is that there is a conflict among cases within the Seventh Circuit on this point. Again, this is inaccurate.

The Seventh Circuit in the instant case, as well as in the two cases cited by Ekanem, *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979); *Jenkins v. Blue Cross Mutual Hospital Insurance*, 538 F.2d 164 (7th Cir. 1976), applied the *Sanchez*-type principle of "like and related". Thus, there is no conflict within the Seventh Circuit about the legal principle to apply in determining the scope of a judicial complaint founded upon an EEOC charge.

Furthermore, even assuming *arguendo* that such an inner-circuit conflict did exist, that is not a proper basis to grant a Writ. Conflicts among the Circuits, not within a Circuit, is one of the measuring standards. Rehearing at the Circuit Court is the appropriate process for addressing inner-circuit conflicts. Ekanem's request for a rehearing *en banc* was denied. 33 FEP 1883 (7th Cir. 1984).

D.

Irrespective of Ekanem's contentions on the "like and related" principle, the Writ should be denied because there was a more compelling reason for finding he was not a proper class representative—he never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay.

Even assuming the validity of Ekanem's arguments on the "like and related" issue, it is inappropriate to grant the Writ because there was another and even more compelling reason why he was held not to be a proper class representative on the issue of pay. He never alleged in his judicial complaint (which was amended three times) that he had

been discriminated against because of his race with respect to his pay.

The Complaint that went to trial was Ekanem's Third Amended Complaint. [Respondent App. p. 1-12]. Rhetorical paragraph 6 of that Complaint set forth the individual allegations of Ekanem. [Respondent's App. p. 3-4, ¶6]. Nowhere within that paragraph did Ekanem allege that he had been discriminated against with respect to his pay due to race. The District Court outlined Ekanem's individual claims. Race discrimination in pay was not one of them. [24 FEP at 1260, ¶8(a)]. The District Court found that Ekanem never even alleged in his judicial complaint that he had been racially discriminated against in his pay and therefore, on that basis also, he was an improper class representative on that claim. [24 FEP at 1276, ¶209]. The Seventh Circuit also observed this, *Ekanem II*, 724 F.2d at 573, and did not find it to be clearly erroneous.

This Court has made it clear that a class representative must have suffered the same or similar injury as members of the class he seeks to represent. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977). If a plaintiff never filed an EEOC charge alleging something to be a discriminatory practice towards him, a claim that such practice is discriminatory against a class cannot be pursued because plaintiff is not a proper class representative for that claim. *Movement for Equality v. Detroit Diesel*, 18 FEP 557, 566 (S.D. Ind. 1978), *aff'd*, 622 F.2d 1235 (7th Cir. 1980).

While a plaintiff who claims one type of discrimination in his EEOC charge may be permitted to litigate an allegation of different but "like and related" discrimination in his judicial complaint, he certainly may not litigate, nor be a proper class representative for, a discrimination claim he never even alleged in his lawsuit.

Ekanem was not a proper class representative for race discrimination in pay practices not only because he never filed a charge with the EEOC on that point but also, and

more compellingly, because he did not even allege such a claim in his judicial complaint. Therefore, the Writ should be denied.

E.

It is of no moment if the Seventh Circuit erred in holding Ekanem was not a proper class representative for pay discrimination claims since the District Court did not apply an erroneous legal standard in judging the evidence on pay discrimination and it ruled against that claim on the mertis.

Ekanem argued to the Seventh Circuit and argues to this Court that the class issue on pay should have been remanded.

This is based on a claim that the District Court applied an inappropriate legal standard in considering statistical evidence. This contention is founded upon a statement made during trial wherein the District Court indicated it elected not to predicate a ruling on Ekanem's statistical evidence because it confined its analysis to the work force within the Corporation and gave no consideration to the availability of qualified personnel in the work force of the metropolitan district. The Seventh Circuit found this to be an error and stated:

> "Given this error and the district court's failure to take into account evidence, factors and job classification and years of service, we ordinarily would remand for supplemental findings applying the correct legal principles."

Ekanem II, 724 F.2d at 572. Although the decision was affirmed in their favor, Respondents' petitioned for rehearing on whether the District Court applied an erroneous legal principle in evaluating class evidence, because Ekanem petitioned for rehearing on whether he was a proper class representative for pay claims. Respondents contended that if the Appellate Court granted Ekanem's petition for rehearing on the issue of proper class representation that there was no need to remand the case for supplemental findings.

While it is true that the District Court made such a statement at trial, it is not true that there was anything in its written opinion which indicates that it applied any erroneous legal principle to the class claims on which statistical evidence was presented.

Ekanem presented statistical evidence on only three class issues: job assignment [24 FEP at 1271, ¶154]; pay [24 FEP at 1272-73, ¶'s 170-173]; and classification [24 FEP at 1273, ¶174]. No statistical evidence was presented by Ekanem on the class issues of transfer/advancement through a seniority system [24 FEP at 1271, ¶159], supervision [24 FEP at 1271, ¶161], application of educational criteria for selection of salaried positions [24 FEP at 1272, ¶163], promotions [24 FEP at 1272, ¶165], disciplinary actions and discharges [24 FEP at 1273, ¶179], or testing [24 FEP at 1273, ¶185].

Thus, the only class claims the District Court had to analyze in view of statistical evidence offered by Ekanem were (1) initial job assignment, (2) pay, and (3) classification.

The District Court's analysis of the evidence with respect to job assignment and classification is found in 24 FEP at 1271, ¶'s 153-156 and 24 FEP at 1273, ¶'s 174-177. Ekanem contended that Respondents discriminated against blacks with respect to initial job assignment and in classifications to which they were assigned. In analyzing those claims, it is appropriate to look to the availability of blacks in the outside labor market, not the availability of blacks within the Corporation. The District Court noted this in its written findings. [24 FEP at 1271, ¶154 and 24 FEP at 1273, ¶175]. Thus, with respect to these two class claims, the comment from the bench was accurate.

On the only other class issue involving statistical evidence—pay—the District Court did *not* impose a requirement of comparison to the outside labor force. In fact, the District Court did precisely that which the Seventh Circuit's decision claimed that it did not do. In paragraph 170 of its opinion, [24 FEP at 1272], the District Court found that the exhibits showing that corporate-wide, on average, blacks made less than whites co-mingled different labor

grades as well as many hundreds of different jobs. It went on to note in paragraphs 171 and 172, [24 FEP at 1272-73], that when the statistics were adjusted for "*job category*" and "*for seniority*," (emphasis added) Ekanem's own expert testified that in the majority of cases race was *not* a factor. Thus, the District Court *did* take into account evidence of job classification and years of service as a basis for rejecting Ekanem's statistical evidence on the class issue of pay. [24 FEP at 1277, ¶219].

The District Court's statement during trial was appropriate for class claims of initial job assignment and classification. Furthermore, its written findings show that it applied the proper legal principles with respect to those class claims upon which statistical evidence was presented. Thus, there was no need to remand the case. It had already taken into account evidence of job classification and years of service. Supplemental findings were not necessary.

F.

The fact that Petitioner feels that the lower court's decision was unfair is not a proper ground to grant the Writ.

A third reason Ekanem claims his Writ should be granted is that he believes the Seventh Circuit's decision is unfair.[4] To accept such a standard would be to encourage every losing litigant to file a Petition for Writ of Certioriari. Clearly, this is not an appropriate consideration to suggest as a basis for granting the Writ.

II

The Writ should be denied on the issue of the Appellate Court's refusal to remand the case and the claimed unlawful denial of class relief under 42 U.S.C. §1981

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4. In his Petition, Ekanem alleges there were over 100 class members who never filed charges of discrimination with the EEOC because of the pendency of this lawsuit. Respondents submit there is nothing in the record of the District Court or the Court of Appeals to support such an allegation.

and §1983 because Ekanem never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay and the District Court found against that class claim on the merits.

Ekanem also seeks to have the Writ granted on the grounds that the Seventh Circuit's refusal to remand the case after finding the District Court had applied an erroneous legal principle denied Ekanem and the class relief to which they were entitled under 42 U.S.C. §1981 and §1983. He bases this on the fact that claims under Title VII and 42 U.S.C. §1981 are independent.

Initially, it must be noted that the District Court found Ekanem was not a proper class representative for the claims at issue here under 42 U.S.C. §1981 and §1983 either. This is for the same reasons cited in section I(D) above. Nowhere in paragraph 6 of Ekanem's judicial complaint did he allege that he was discriminated against with respect to his pay on the basis of race. Thus, irrespective of race. Thus, irrespective of whether he filed a such a claim with the EEOC under Title VII, he cannot be a proper class representative for claimed race discrimination in pay practices under other statutes either since he never alleged in his judicial complaint that he had been discriminated against on such a basis. *Falcon* and *Rodriguez, supra.* The District Court so found. [24 FEP at 1276, ¶209]. Therefore, it was appropriate for the Seventh Circuit not to remand the case.

Not only was Ekanem an improper class representative for racial pay claims under 42 U.S.C. §1981 and §1983, but for the reasons stated in section I(E) above, it is clear that the District Court did not apply an erroneous legal standard, but actually considered at length the statistical evidence with respect to the class pay claim. [24 FEP at 1272-73, ¶'s 170-173]. In fact, the District Court found that the evidence presented by Ekanem on the class pay claim supported the Defendants. It concluded each of the class claims under 42 U.S.C. §1981 and other statutes failed on their merits. [24 FEP at 1277, ¶226].

Therefore, it is of no moment that claims under Title VII and 42 U.S.C. §1981 and §1983 are independent. The lower court found Ekanem was not a proper class representative under those latter statutes because he never alleged in his judicial complaint an individual claim of race discrimination in pay. Furthermore, even if he was a proper representative, the District Court ruled against Ekanem on the merits of that claim.

III

The Writ should be denied on the issue of the First Amendment because the Seventh Circuit's opinion is not contrary to and in conflict with this Court's decisions.

Ekanem asserts that the Seventh Circuit's decision as to his First Amendment claims is contrary to and in conflict with earlier Seventh Circuit and Supreme Court decisions. He contends the Seventh Circuit rejected his First Amendment argument based upon its conclusion that "privately expressed opinions regarding his public employment are not entitled to First Amendment protection...." [Petition p. 19]. This assertion, however, totally misrepresents the Seventh Circuit's reason for denying Ekanem's First Amendment claim.

Nowhere in its decision did the Seventh Circuit state or imply that a public employee loses the protection of the First Amendment if his protected speech occurs in private rather than in public. Instead, the Seventh Circuit focused on whether Ekanem's allegedly protected speech involved matters of *public concern* so as to warrant First Amendment protection. The court stated:

> "Ekanem's contention that his conduct was protected by the first amendment is also without merit. Ekanem's May 1979 memorandum to Dr. Johnson, which defendants acknowledge was 'the trigger event for his termination,' clearly dealt with internal matters concerning the reorganization of Dr. Johnson's department and Ekanem's proposal for a new position that would give him broader supervisory powers and a

> higher salary. *The memorandum did not comment on matters of public concern such as to warrant first amendment protection.*

Ekanem II, 724 F.2d at 571 (Emphasis added).

The Supreme Court has addressed the issue of whether matters of purely private concern to a public employee should be entitled to First Amendment protection. In *Connick v. Meyers*, ____ U.S. ____, 103 S.Ct. 1684, 1689 (1983), this Court held:

> "*Pickering*, its anticedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."

The Seventh Circuit's opinion in this case has a specific citation to *Connick, supra.*, as authority for the proposition that a threshold issue in the Ekanem-type of First Amendment case is a determination whether the allegedly protected speech involved matters of public concern. Thus, the Seventh Circuit's decision as to Ekanem's First Amendment claims was in accordance with clear precedent by this Court.

CONCLUSION

Petitioner has failed to articulate any reasons or considerations of the character specified in Supreme Court Rule 17 that would suggest the Court should exercise its judicial discretion and grant review. Furthermore, when one scrutinizes the appropriate considerations it is abundantly clear that the Writ of Certiorari should be denied.

Respectfully submitted,

Gregory J. Utken
Roberts, Ryder, Rogers & Scism
Suite 2020, One Indiana Square
Indianapolis, Indiana 46204
317/639-5656

Counsel for Respondents

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALFRED EKANEM, et al.,

Plaintiffs,

vs.

THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, et al.,

Defendants.

Civil Action No.
IP 77-224-C

THIRD AMENDED COMPLAINT

Plaintiffs complain of defendants, and each of them, and allege as follows:

COUNT I

Jurisdiction

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3)(4), 42 U.S.C. §2000e-5(f), 28 U.S.C. §§ 2201 and 2202, the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. §§ 1981, 1983, 1985(3) and 1988. The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights secured by (a) 42 U.S.C. §§2000e et. seq., providing for injunctive, and other relief from racial, color, national origin and other discrimination in the terms and conditions of training and employment, and (b) 42 U.S.C. §1981, providing for the equal rights of all persons in every State and Territory within the jurisdiction of the United States to contract.

2. This is a proceeding for a declaratory judgment as to the plaintiffs' rights, and for preliminary and permanent injunctions, restraining the defendants from maintaining and continuing discriminatory action against the plaintiffs because of their race, color and national origin and because of their opposition to the defendants' conduct which equal unlawful employment practices under 42 U.S.C. §§2000e-20002 15 and because of their charges filed under said act and their parti-

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cipation in the proceedings instituted. The conduct which plaintiffs request this Court to enjoin are discriminatory hiring practices, discriminatory promotion and transfer practices, discriminatory classification and pay practices, discriminatory discharge practices, discriminatory testing practices, discriminatory recruiting practices, and discriminatory disciplinary and demotion practices, all of which deprive plaintiffs and the class they represent of all rights to benefits and employment opportunities to which they are entitled.

Class Allegations

3. Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of all persons who have been punished, permitted to be punished, retaliated against, disciplined or permitted to be disciplined because they opposed employment practices engaged in by defendants which were made unlawful by the Title VII of the Civil Rights Act of 1964, as amended, since July 2, 1965, all black employees who were employed by the defendant company on July 2, 1965, or at any time thereafter, or who may in the future be employed, and all black persons who applied for employment with defendant company on July 2, 1965, or any time thereafter, or who may in the future apply for employment, and only those applicants for employment, who have been or may be adversely affected by any of the following practices:

1. Discrimination against blacks in the hiring of salaried employees.
2. Discrimination against black employees in assignment of jobs.
3. Discrimination against black employees in the denial of job transfer and advancement through the operation of the seniority system.
4. Discrimination against black employees in the selection for supervisory positions.
5. Discrimination against black employees and

applicants in the application of enducational criteria for selection into salaried positions.

6. Discrimination against black salaried employees in promotions.

4. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race, color and national origin. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. Defendants have acted or refused to act on grounds generally applicable to the class.

5. This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of discriminating against plaintiffs and other black persons in this class because of race, color and national origin with respect to compensation, terms, conditions and privileges of employment and in ways which deprive plaintiffs and other persons in the class of equal employment opportunities and otherwise adversely affect their status as employees because of race, color and national origin. This complaint also seeks restitution to plaintiffs and the class they represent of all rights, privileges, benefits and income that would have been received by them but for defendants' unlawful and discriminatory practices.

Individual Plaintiffs

6. Alfred Ekanem, is a black male who resides in Indianapolis, Indiana. He was employed by defendant, Health and Hospital Corporation of Marion County, Indiana, in October of 1972, as a clerk typist, at which time he held a Master's Degree in Health and Hospital Administration with a specialty in Labor Relations. He continued in the employment of defendant,

Health and Hospital Corporation of Marion County, Indiana, until February 2, 1977, when he was unlawfully discharged because of his race, color and national origin and because he opposed the discriminatory employment practices of defendants, which are violative of the Civil Rights Act of 1964, as amended. In December, 1974, Alfred Ekanem was subjected to discriminatory involuntary transfer and demoted. Also, Alfred Ekanem was subjected to discriminatory testing requirements and procedures. On or about February 11, 1975, Alfred Ekanem filed charges of race discrimination and retaliation against defendants with the Equal Employment Opportunity Commission. On February 7, 1977, Alfred Ekanem filed a supplemental charge of retaliation against defendants with the Equal Employment Opportunity Commission and requested a right to sue letter. On March 3, 1977, the Equal Employment Opportunity Commission issued its determination that there is reasonable cause to believe that respondent, Health and Hospital Corporation of Marion County, Indiana, is engaging in unlawful employment practices. On April 15, 1977, the United States Department of Justice issued a notice of right to sue to Alfred Ekanem. Between November, 1978 and June, 1979, the defendant, Health and Hospital Corporation of Marion County, Indiana, continued to intimidate and harass the plaintiff, Alfred Ekanem, said defendant, Health and Hospital Corporation, also retaliated against plaintiff Ekanem during said period of time in violation of the Civil Rights Act of 1964, as amended. In addition thereto, defendant violated plaintiff Ekanem's right to freedom of speech and expression as guaranteed by the First Amendment to the Constitution of the United States. Retaliation referred to herein culminated in plaintiff Ekanem's discharge from his employment with the Health and Hospital Corporation on or about June 10, 1980. Plaintiff Ekanem filed charges of retaliation with the Equal Employment Opportunity Commission on November 21, 1979.

7. Linda Murray Marshall resides in Indianapolis, Indiana,

and is a citizen of the United States. She was employed by the defendant, Health and Hospital Corporation of Marion County, Indiana, on February 2, 1970. In 1974 Linda Marshall opposed the discriminatory employment practices of the Health and Hospital Corporation. She filed charges on that basis in 1974 against defendants before the Equal Employment Opportunity Commission. On February 2, 1977, Linda Marshall was discharged by the defendant, Health and Hospital Corporation of Marion County, Indiana, because she opposed the discriminatory employment practices of the defendants. On February 7, 1977, Linda Marshall filed supplemental charges of retaliation against the Health and Hospital Corporation of Marion County, Indiana. Also, Linda Marshall was continuously denied performance evaluations, raises and harassed by the officials of Health and Hospital Corporation. Unwarranted and negative memos were placed in her personnel file. She was given burdensome assignments and a volume of work normally assigned to 2-3 persons. Plaintiff, Linda Marshall, was unfairly denied earned benefits such as vacation.

8. Toni Hardiman Spicer is a black female who resides in Indianapolis, Indiana, and is a former employee of defendant, Health and Hospital Corporation of Marion County, Indiana. Toni Spicer was discriminatorily discharged by Health and Hospital Corporation on or about August 2, 1974. On August 5, 1974, she filed charges against the Health and Hospital Corporation (Marion County General Hospital, now Wishard Memorial Hospital) alleging unlawful and discriminatory employment practices. On January 18, 1977, Toni Spicer received a notice of right to sue issued by the United States Department of Justice.

9. Donald Kemp is a white male citizen who resides in Indianapolis, Indiana. He was employed by the defendant, Health and Hospital Corporation of Marion County, Indiana, on June 1, 1971. He opposed the unlawful and discriminatory

employment practices of the defendants. He was subjected to discriminatory and retaliatory treatment by the defendant, Health and Hospital Corporation, because he opposed the discriminatory employment practices conducted by the defendants. In 1974 he filed charges against the defendant, Health and Hospital Corporation, with the Equal Employment Opportunity Commission because of defendants' retaliatory actions against him. On Feburary 2, 1977, Donald Kemp was discharged by the Health and Hospital Corporation of Marion County, Indiana, because he opposed the practices of the defendants, which were discriminatory and violative of the Civil Rights Act of 1964, as amended. Prior to Donald Kemp's discharge he was subject to unlawful demotions. On February 7, 1977, Donald Kemp filed supplemental charges of retaliation against the Health and Hospital Corporation of Marion County, Indiana.

10. Alfred Ekanem held a position of Deputy Administrator of the Community Development Health Programs of the Health and Hospital Corporation at the time of his unlawful discharge on February 2, 1977. Previously Alfred Ekanem worked as Assistant Personnel Director of the Health and Hospital Corporation assigned to Wishard Memorial Hospital. Donald T. Kemp held a position of Health Project Associate for the Community Development Health Programs of the Health and Hospital Corporation. Toni Spicer served as a telephone operator assigned to Wishard Memorial Hospital immediately prior to the time of her discharge. Linda Murray Marshall held a position of Administrative Secretary of the Community Development Health Programs of the Health and Hospital Corporation on February 2, 1977. Prior to that time she worked as an Information Clerk assigned to Wishard Memorial Hospital.

Defendants

11. The Health and Hospital Corporation of Marion County, Indiana, is a municipal corporation and was created by the Acts of Indiana 1951, Chapter 287 as amended, and supplemented, to

administer Public Hospitals and to control Public Health problems and to offer public health services. Section 2 of Chapter 287 of Acts of Indiana 1951 provides that the municipal corporation may be sued in its own name and may contract and be contracted with.

12. The executive and legislative businesses of the corporation are executed by a Board of Trustees. Such Board is empowered by Indiana Acts of 1951, Chapter 287 as amended, to create divisions and appoint an Executive Director and to appoint a Director over each division.

13. The Board created the Division of Public Health, Dr. Frank Johnson is its present Director.

14. The Board created the Division of Public Hospitals, of which Wishard Memorial Hospital is a part, and Dr. Van Hoek is Superintendent and Medical Director of such division. Also, Regenstrief is a unit of the Division of Public Hospitals and Richard Laird is its Administrator.

15. The Board, pursuant to appropriate authority, has created a Personnel Division; Mrs. Leo Vorbis is the present Director of such Personnel Division.

16. The Health and Hospital Corporation of Marion County, Indiana, is located in Indianapolis, Indiana, at 1941 City-County Building and maintains various facilities throughout Marion County, Indiana, and designed to offer health care. Defendant, Health and Hospital Corporation and each of its Divisions named defendants herein, are employers within the meaning of the Civil Rights Act of 1964, as amended.

17. Indiana University is a school of higher education created by the legislature to offer courses of study on the college and university level. Indiana University School of Medicine is a division of Indiana University and was created to offer a course of medical education and in the course thereof, to offer certain medical care. Steven C. Beering, M.D., is the Dean of Indiana University School of Medicine. Indiana University School of Medicine is presently managing and operating

Wishard Memorial Hospital pursuant to the terms of a contract with the Health and Hospital Corporation of Marion County, Indiana, defendant herein. Said Indiana University and Indiana University School of Medicine are joined as defendants herein in order to secure complete relief for the plaintiffs and in order to provide Indiana University and Indiana University School of Medicine the opportunity to appear and defend to the extent that its interests may appear.

18. Defendants have denied plaintiff, Alfred Ekanem employment on the same basis as is afforded to white persons and have retaliated against plaintiff Ekanem because he opposed their practices which are discriminatory under the Civil Rights Act of 1964, as amended, and because he filed charges against the defendants of racial discrimination and retaliatory charges and has otherwise protested defendants' unlawful practices.

19. Defendants have discriminated against plaintiff Spicer by denying her promotion, salary increases, and by placing unwarranted and discriminatory evaluations in her file without her knowledge and by unlawfully discharging her.

20. Defendants have discriminated against plaintiffs Kemp and Marshall by subjecting them to retaliatory measures, including discharge, because they opposed and protested defendants' unlawful practices of employment discrimination as recited herein.

21. Defendants, in violation of the provisions of Title VII of the Civil Rights Act of 1964, have denied and continue to deny plaintiffs and the class they represent, equal opportunity for employment because of their race, color and national origin.

22. Each defendant has engaged and is engaging in the following unlawful practices:

1. Discrimination against blacks in the hiring of salaried employees.

2. Discrimination against black employees in assignment of jobs.

3. Discrimination against black employees in the denial of job transfer and advancement through the operation of the seniority system.

4. Discrimination against black employees in the selection for supervisory positions.

5. Discrimination against black employees and applicants in the application of educational criteriaffor selection into salaried positions.

6. Discrimination against black salaried employees in promotions.

23. The purpose, intent and effect of the acts set forth above are to deny the classes hereinabove described equal opportunity for employment.

24. The plaintiffs and the class they represent have suffered and will continue to suffer irreparable harm and injury as a result of the past and present discriminatory employment practices of defendants based on race, color and national origin. The plaintiffs and the class they represent have no adequate plain of speedy remedy at law.

Second Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent, allege as follows:

25. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

26. Defendants have discriminated against plaintiffs in violation of rights secured to them by the Thirteenth Amendment to the United States Constitution and by 42 U.S.C. §1981.

Third Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent allege as follows:

27. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

28. Defendants have discriminated against plaintiffs, in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. §1983.

Fourth Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent allege as follows:

29. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

30. Defendants have discriminated against plaintiffs, in violation of rights secured to them by 42 U.S.C. §1985(3).

Fifth Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent allege as follows:

31. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

32. Defendants have discriminated against plaintiffs, in violation of rights secured to them by 42 U.S.C. §1988.

33. Each right to sue letter mentioned herein is attached hereto.

Sixth Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp,,Linda Marshall and Toni Spicer and the class they represent allege as follows:

34. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

35. The employment practices of defendants, more particularly described above, denied and continue to deny plaintiffs and the class they represent, equal employment opportunity within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq.

36. The plaintiffs and the class which they represent exhausted all administrative requirements under Title VII.

37. On or about May 9, 1978, the United States Department of Justice issued a Notice of Right to Sue against defen-

dant, Marion County Health and Hospital Corporation, on the charges of employment discrimination, including retaliation, to Donald Kemp, plaintiff. Such charges were filed with EEOC on February 7, 1977.

38. On or about April 27, 1978, the United States Department of Justice issued Notices of Right to Sue against defendant, Marion County Health and Hospital Corporation, on the charges of employment discrimination, including retaliation, to plaintiffs, Alfred Ekanem and Linda Marshall. Such charges were filed with EEOC on February 7, 1977.

39. The defendants unlawfully retaliated against the plaintiffs within the meaning of §704 of Title VII.

Seventh Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer and the class they represent allege as follows:

40. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

41. Defendants have discriminated against plaintiffs, in violation of rights secured to them by the First Amendment to the United States Constitution.

WHEREFORE, plaintiffs pray this Court to advance this case on the docket, order a speedy hearing at the earliest practical date, and cause this case to be in every way expedited, and after such hearing to:

(a) Enter a declaratory judgment that the practices complained herein are unlawful and in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866;

(b) Permanently enjoin the defendants, their agents, successors, employees, attorneys and those acting in concert with the defendants, from engaging in each of the unlawful practices and policies;

(c) Modify unlawful practices and policies set forth herein and any other practice shown to be in violation of applicable law so that they do not discriminate on the basis of race, color, or national origin;

(d) Assign plaintiffs the positions they would now be occupying but for the discriminatory practice of defendant;

(e) Award the plaintiffs the cost and disbursements of this action including, but not limited to, reasonable attorney fees;

(f) That the defendants be required to reinstate plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, to their employment immediately and grant full back pay following a hearing and on such terms as the Court deems just; and to allow punitive and compensatory damages.

(g) That the Court award preliminary costs and fees to the plaintiffs;

(h) Grant such other relief that may be just and proper.

Respectfully submitted,

John O. Moss
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been mailed to the following attorney of record, this ___ day of September, 1980.

Michael W. Owen, Esq.
Gregory J. Utken, Esq.
One Indiana Square, Suite 2020
Indianapolis, Indiana 46204

John O. Moss
Attorney for Plaintiffs